79-1538

No.

In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
APPELLANT

v.

VIRGINIA SURFACE MINING AND RECLAMATION
ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The main opinion of the district court (App. D, *infra*, 21a-75a) is not reported. A supplementary opinion of the district court, issued in response to the Secretary of the Interior's motion for a stay (App. B, *infra*, 4a-16a), is also not reported. The opinion of the court of appeals at the preliminary injunction stage (App. E, *infra*, 76a-85a) is reported at 604

F.2d 312. The opinion of the district court at the preliminary injunction stage (App. F, *infra*, 86a-101a) is not reported.

JURISDICTION

The final order of the district court (App. C, *infra*, 17a-20a) was entered on January 3, 1980. An amending order (App. A, *infra*, 1a-3a) was entered on January 21, 1980. The Secretary of the Interior filed a notice of appeal to this Court on February 1, 1980 (App. G, *infra*, 102a-104a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Tenth Amendments to the United States Constitution and the relevant portions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.*, are reprinted in App. I, *infra*, 106a-145a.

QUESTIONS PRESENTED

1. Whether Sections 515(d) and (e) of the Surface Mining Control and Reclamation Act of 1977, which prescribe certain performance standards for surface coal mining operations conducted on steep slopes, violate the Tenth Amendment.

2. Whether the district court properly ruled that Sections 515(d) and 522(e) of the Act take private property without just compensation, in violation of the Fifth Amendment.

3. Whether the district court properly enjoined the issuance of summary cessation orders under Section 521(a)(2) of the Act and the imposition of civil penalties under Section 518 on the ground that those provisions violate the Due Process Clause of the Fifth Amendment.

STATEMENT

1. This appeal involves a challenge to the constitutionality of several critical provisions of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, 30 U.S.C. (Supp. I) 1201 *et seq.* Congress passed the Act in order to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations * * *." 30 U.S.C. (Supp. I) 1202(a).[1] The principal regulatory and

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[1] In Section 101(c) of the Act, 30 U.S.C. (Supp. I) 1201(c), Congress announced its finding that

> many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources * * *.

enforcement provisions of the statute are contained in Title V, 30 U.S.C. (Supp. I) 1251-1279.[2]

Section 501 of the Act establishes a two-stage program for the regulation of surface coal mining. Section 501(a), 30 U.S.C. (Supp. I) 1251(a), directs the Secretary of the Interior to promulgate regulations covering an initial period during which mine operators will be required to comply with only some of the environmental protection performance standards established by the Act. Section 502(c) of the statute specifies which of the performance standards listed in Section 515 must be made applicable during this interim period. See 30 U.S.C. (Supp. I) 1252(c), 1265. In particular, Section 502(c) requires that Section 515(d), setting performance standards for "steep-slope" surface coal mining, must be implemented by the Secretary's interim regulations. In addition, certain other provisions of the Act become immediately effective by their own terms during the interim period. One example is Section 522(e), 30 U.S.C. (Supp. I) 1272(e), which prohibits, with various exceptions, surface coal mining on certain lands or within specified distances of certain structures or facilities. The Secretary promulgated his interim

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[2] Title II of the Act creates the Office of Surface Mining Reclamation and Enforcement ("OSM") within the Department of the Interior. The Secretary of the Interior, acting through OSM, is charged with the principal responsibility for administering and implementing the Act. See 30 U.S.C. (Supp. I) 1211(c).

regulations on December 13, 1977 (42 Fed. Reg. 62639), and they are currently in effect.[3]

The second stage of the regulatory program established by the Act is the permanent phase. Section 501(b) directs the Secretary to promulgate permanent regulations incorporating all the performance standards set forth elsewhere in the Act, including, of course, the "steep-slope" standards described in Section 515(d). The Secretary published his permanent regulations on March 13, 1979 (44 Fed. Reg. 14902), but their effectiveness must await the implementation of a permanent state or federal program in accordance with Sections 503 and 504 of the Act, 30 U.S.C. (Supp. I) 1253, 1254.

Section 502(e) of the Act makes the Secretary responsible for enforcing the interim performance standards. Congress has provided for financial reimbursements to states that actively assist the federal enforcement effort during the interim period (see Section 502(e)(4), 30 U.S.C. (Supp. I) 1252(e)(4)), but, until the permanent phase of the program, the

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[3] Portions of the interim regulations have been challenged in the United States District Court for the District of Columbia, pursuant to Section 526(a)(1) of the Act, 30 U.S.C. (Supp. I) 1276(a)(1). *In re Surface Mining Regulation Litigation*, 452 F. Supp. 327 (D.D.C. 1978); *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301 (D.D.C. 1978). Some of the statutory provisions at issue in the present case were attacked in the District of Columbia litigation, and the district court sustained the validity of those provisions. See 456 F. Supp. at 1319-1321. Consolidated appeals from other aspects of the district court's decision are pending. Nos. 78-2190, 78-2191, and 78-2192 (D.C. Cir. argued June 5, 1979).

statute does not authorize the Secretary to cede the federal government's independent enforcement role to states that wish to conduct their own regulatory programs. States may continue to issue permits governing surface mining operations during the interim period, but any such permits must comply with the federal interim performance standards. 30 U.S.C. (Supp. I) 1252(b). The Act does not require any state to enforce any of the interim standards. Under Section 502(e), the Secretary's interim regulations and enforcement program are to remain in effect until a permanent state program is approved under Section 503 or a permanent federal program is implemented under Section 504.[4]

Section 503 of the Act provides that any state interested in assuming permanent regulatory authority over surface coal mining operations within its borders must submit a proposed program to the Secretary demonstrating that the state legislature has enacted laws implementing the environmental protection standards established by the federal statute and accompanying regulations and that the state has the administrative and technical ability to enforce those standards. 30 U.S.C. (Supp. I) 1253.[5] The Secretary

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[4] Certain coal mining operations are exempt from the Act's requirements. They include: operations on two acres of land or less; operations involving the extraction of coal for personal, noncommercial use; and operations incident to a publicly financed highway project. 30 U.S.C. (Supp. I) 1278.

[5] Initially, the proposed state programs were to be submitted by February 3, 1979, 18 months after enactment of the federal statute. Exercising his authority under Section 504(a) of the Act, the Secretary postponed the due date until Au-

must approve or disapprove each such proposed program in accordance with the time schedules and procedures established by Sections 503(b) and (c).[6] In addition, the Secretary is required, under Section 504 of the Act, 30 U.S.C. (Supp. I) 1254, to develop a federal program for implementing the federal statutory provisions on a permanent basis in each state that fails to submit or enforce a satisfactory program.

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gust 3, 1979. 44 Fed. Reg. 15324 (1979). Because the Secretary's March 1979 publication of his permanent regulations occurred seven months after the date set by Congress (see 30 U.S.C. (Supp. I) 1251(b)), the United States District Court for the District of Columbia further extended the deadline for submission of state programs to and including March 3, 1980. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. July 25, 1979 and Aug. 21, 1979). The district court's injunctive order and subsequent opinion are reported at 13 E.R.C. 1447 and 13 E.R.C. 1586. See also 44 Fed. Reg. 60969 (1979) (announcing conforming changes in the Secretary's regulations governing submission of state programs). (The district court litigation in No. 79-1144 involves a challenge to the validity of some of the Secretary's permanent regulations. On February 26, 1980, the district court issued an opinion dealing with approximately half of the challenged regulations. The opinion is not yet reported.)

[6] With the exception of Georgia, Alaska, and Washington, all states in which surface coal mining is conducted submitted proposed state programs to the Secretary by March 3, 1980. On February 4, 1980, the Secretary approved the Texas program, on the condition that the State agree to certain modifications. 45 Fed. Reg. 12998 (Feb. 27, 1980). On February 15, 1980, the Secretary approved parts of the Wyoming program and disapproved other parts. The Secretary has not yet acted on any other proposed state programs, including that submitted by Virginia.

2. On October 23, 1978, the Virginia Surface Mining and Reclamation Association, Inc., 63 of the Association's member coal companies, and four individual landowners filed this suit broadly challenging the constitutionality of Title V of the Act and, in particular, those statutory provisions to be implemented during the interim phase of the regulatory program. The Commonwealth of Virginia and the Town of Wise, Virginia, intervened as plaintiffs. The Virginia Citizens for Better Reclamation, Inc., and the Town of St. Charles, Virginia, intervened as defendants in support of the Secretary's enforcement of the Act.

Plaintiffs advanced several arguments against the Act's validity. They contended: (1) that the statute is beyond the scope of the congressional power to regulate interstate commerce under Article I, Section 8, of the Constitution; (2) that the Act has a disproportionate economic effect in southwest Virginia and thereby violates the equal protection component of the Due Process Clause of the Fifth Amendment; (3) that the Act violates the Tenth Amendment because it usurps an "integral governmental function" traditionally reserved to and performed by the states; (4) that, by imposing certain restrictions and conditions on surface mining operations, the Act effects a taking of private property without just compensation, in violation of the Fifth Amendment; and (5) that the Act's enforcement provisions, especially those establishing a system of civil penalties and authorizing cessation orders against imminently dangerous conditions and practices, deny coal mine operators due process of law in violation of the Fifth Amendment.

On February 14, 1979, after a hearing on plaintiffs' motion for a preliminary injunction, the district court enjoined the Secretary from taking any action to enforce Sections 502-522 of the Act pending final disposition of plaintiffs' action on the merits (App. F, *infra*, 86a-101a). The district court and the court of appeals denied the Secretary's application for a stay pending appeal of the preliminary injunction.

On August 10, 1979, the court of appeals reversed and dissolved the district court's injunction (App. E, *infra*, 76a-85a). The court of appeals held that the district court applied an incorrect standard in determining whether to grant preliminary injunctive relief. In the court of appeals' view (*id.* at 80a-81a), Section 526(c) of the Act, 30 U.S.C. (Supp. I) 1276(c), describes the criteria that should govern requests for interlocutory injunctions against enforcement of all or part of the statute. The district court erred in granting such relief, the court of appeals held, because two of the requirements listed in Section 526(c) were not satisfied. The district court did not determine that plaintiffs were likely to succeed on the merits nor did it find that a preliminary injunction would "not adversely affect the public health or safety or cause significant environmental harm to land, air or water resources." Moreover, the court of appeals observed (App. E, *infra*, 83a), the district court "wholely ignored the Congressional findings set forth in § 101 of the Act." See note 1, *supra*.

While the Secretary's appeal of the preliminary injunction was pending, the district court held a 13-

day trial on plaintiffs' request for a permanent injunction. On January 3, 1980, the court issued an order (App. C, *infra*, 17a-20a) and opinion (App. D, *infra*, 21a-75a) declaring several critical provisions of the Act unconstitutional and permanently enjoining their enforcement. The court rejected plaintiffs' Commerce Clause and equal protection challenges to the Act (*id.* at 26a-29a, 41a-42a). The court held, however, that the Act "operates to displace the states' freedom to structure integral operations in numerous areas of traditional functions and is in contravention of the Tenth Amendment" (App. C, *infra*, 18a; see App. D, *infra*, 30a-41a). In particular, the court ruled that "[t]he portions of the act requiring steep slopes to be restored to approximate original contour are not environmentally sound and do not serve the interests of the federal government and are so burdensome on the Commonwealth of Virginia as to threaten its economy" (App. C, *infra*, 18a). The court therefore enjoined the enforcement of the steep-slope mining standards contained in Sections 515(d) and (e) of the Act, 30 U.S.C. (Supp. I) 1265(d) and (e).

The district court also held that Sections 515(d) and (e) of the Act violate the Just Compensation Clause of the Fifth Amendment. In the court's view, Section 515(d) effects an uncompensated taking of private property by requiring steep-slope coal mine operators to restore the approximate original contour of the land after the completion of mining operations. The court said that this statutory obligation renders it "physically and economically impossible to mine the

coal" on steep slopes (App. D, *infra*, 45a). The court found another unconstitutional taking in Section 522 of the Act, 30 U.S.C. (Supp. I) 1272, subsection (e) of which generally prohibits surface coal mining within 100 feet of any cemetery or the "outside right-of-way line of any public road," or within 300 feet of any public building, school, church, public park, or occupied dwelling.[7] Accordingly, the court declared Sections 522 and 515(d) and (e) unconstitutional "until such time as the federal government sees fit to obtain said land by eminent domain and payment of just compensation" (App. C, *infra*, 19a; see App. D, *infra*, 43a-57a).

Finally, the court considered plaintiffs' due process objections to the enforcement provisions of the Act. The court ruled that, before ordering the immediate cessation of any mining practice or condition, the Secretary must either seek judicial intervention or afford mine operators an opportunity for a hearing. The court held that this requirement applies even in cases where the Secretary determines, on the basis of a federal inspection, that a particular practice or condition "creates an imminent danger to the health

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[7] Section 522(e)(5) provides that the prohibition of surface mining within 300 feet of an occupied dwelling may be waived by the dwelling's owner. Similarly, Section 522(e)(4) permits waivers or adjustments of the prohibition against surface mining within 100 feet of roadways. Furthermore, the prohibitions in Section 522(e) are subject to "valid existing rights" and do not apply to mining operations in existence on the date of the statute's enactment. 44 Fed. Reg. 15342 (1979) (to be codified in 30 C.F.R. 761.3).

or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources." Because Section 521(a)(2) of the Act, 30 U.S.C. (Supp. I) 1271(a)(2), authorizes the issuance of cessation orders in such circumstances without a prior hearing, and because, in the court's view, the statute does not provide sufficient guidance concerning the occasions on which such orders are appropriate, the court declared the statute unconstitutional and enjoined its enforcement (App. C, *infra*, 19a; App. D, *infra*, 57a-74a). Although only Section 521(a)(2) authorizes immediate cessation orders, the court's order enjoined subsections (a)(1) and (a)(3) as well (App. C, *infra*, 19a). The court's opinion stated that "[t]he summary issuance of cessation orders is enjoined until such time as Congress makes provisions to correct the use of subjective criteria by [federal] inspectors" (App. D, *infra*, 73a).

The court found fault with two additional aspects of the Act's enforcement procedures. Under Section 525(c) of the Act, 30 U.S.C. (Supp. I) 1275(c), mine operators subject to a cessation order may seek temporary relief from the Secretary. If the cessation order from which relief is sought has been issued under Section 521(a)(2) or (3), the Secretary must act on the application within five days of receipt. The district court ruled that this statutory five-day period is too long and that the Secretary should be required to grant or deny the operator's request within 24 hours (App. D, *infra*, 73a). Apparently in order to

effectuate this statutory revision, the court's January 3 order enjoined Section 525 in its entirety (App. C, *infra*, 19a). The court also enjoined Section 518 of the Act, 30 U.S.C. (Supp. I) 1268, the statute's penalty provision. Although the court's order seemed to enjoin Section 518 in its entirety (App. C, *infra*, 19a), the accompanying opinion showed that the court disapproved only the final imposition of civil penalties without an opportunity for a prior hearing (see App. D, *infra*, 67a-69a, 74a). The court apparently thought that Section 518, especially when read together with the cessation order provision in Section 521(a)(2), can result in an irrevocable assessment of penalties before any administrative review procedures are made available (App. D, *infra*, 68a-69a).

On January 21, 1980, the district court denied the Secretary's motion for a stay pending direct appeal to this Court (App. A, *infra*, 3a). At the same time, the court issued an order and opinion (App. B, *infra*, 4a-16a) clarifying its January 3 decision. The court modified its earlier order in two respects. First, the court declared that its injunction against enforcement of the steep-slope mining standards contained in Section 515(d) was not intended to "allow[ ] spoil to be placed on the downslope in an uncontrolled manner." The court stated that "[a]ny such downslope spoil placement shall be in a controlled manner meeting environmental protection standards specified by the regulatory authority" (App. A, *infra*, 2a). Second, the court announced that the declaratory and injunctive relief awarded against Sections 518, 521,

and 525 of the Act applies "*only* insofar as those sections relate to summary issuance of cessation orders and civil penalties (App. A, *infra*, 2a-3a; emphasis in original) .

After the January 21 modification, the district court's order had the following effects:

(a) it permitted the dumping of soil on the downslope "in a controlled manner," whereas Section 515 (d)(1) of the Act prohibits such dumping altogether on steep slopes;

(b) it relieved steep-slope coal mine operators of the statutory obligation to restore mined land to its approximate original contour and to cover completely the mining cut's highwall, in accordance with Section 515(d)(2);

(c) it eliminated all the surface mining restrictions in Sections 522(e)(4) and (5) based on proximity to roads, dwellings, schools, churches, parks and cemeteries;

(d) it invalidated Section 521(a)(2) of the Act and required the Secretary to provide an opportunity for a hearing before issuance of a cessation order to a mine operator whose practices create an imminent danger to the public health and safety; [8] and

(e) it apparently prohibited the Secretary from requiring the payment of proposed civil penalties into

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[8] In the event Congress "makes provisions to correct the use of subjective criteria by [federal] inspectors" (App. D, *infra*, 73a), the district court would permit the Secretary to resume the issuance of summary cessation orders, but only if he agrees to rule on an operator's request for temporary relief within 24 hours of receipt instead of within the five-day period provided by Section 525(c).

an escrow account as a precondition for obtaining administrative review of a violation notice or cessation order under Section 518(c).

The Secretary applied to this Court for a stay of the district court's judgment pending appeal (No. A-720). On February 25, 1980, the Chief Justice granted a stay pending further order of the Court, and on March 17, 1980, the Court extended the stay "pending the timely filing and disposition" of the Secretary's appeal (App. H, *infra*, 105a).

THE QUESTIONS ARE SUBSTANTIAL

The district court has declared several subsections of the Surface Mining Act unconstitutional and has enjoined the enforcement of important statutory provisions intended to govern surface mining methods at the overwhelming majority of Virginia's coal mines. The court has also enjoined the issuance of summary cessation orders and the collection of civil penalties prior to administrative review of an alleged violation. The court has thus not only weakened the substantive regulatory requirements applicable to surface coal mines but also deprived the Secretary of two critical enforcement tools provided by the Act. If the decision below is permitted to stand, it will deal a severe blow to the congressional effort to protect the environment and the public health and safety through the effective regulation of surface mining.

The district court's ruling is incorrect for several reasons. In the first place, it accords insufficient deference to the well-established principle that "legisla-

tive Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality * * *." *Usery* v. *Turner Elkorn Mining Co.*, 428 U.S. 1, 15 (1976). Moreover, the decision disregards specific congressional findings concerning the need for and the feasibility of surface mining regulation. The district court's opinion resolves far-reaching constitutional questions without the benefit of a specific factual controversy regarding the effect of the Act on particular coal-mining properties. And most important, the court's interpretation of the Tenth Amendment and the Due Process and Just Compensation Clauses of the Fifth Amendment departs drastically from this Court's precedents. Direct appeal to this Court is authorized by 28 U.S.C. 1252, and we ask the Court to note probable jurisdiction to review the district court's dubious constitutional rulings and to confirm the validity of Congress' comprehensive effort to regulate surface mining in the public interest.

1. The district court ruled that Sections 515(d) and (e) of the Act, which establish performance standards for surface mining on steep slopes,[9] violate

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[9] Section 515(d) requires an operator conducting surface mining on a steep slope (i) to reclaim the mined areas by completely covering the highwall and returning the site to its "approximate original contour," (ii) to refrain from dumping spoil material on the downslope below the bench or mining cut, and (iii) to refrain from disturbing land above the highwall, unless permitted to do so by the regulatory authority. Under Section 515(d)(4), a "steep slope" is defined as "any

the Tenth Amendment (App. D, *infra*, 30a-41a). The district court reached this conclusion on the basis of its "findings" that the steep-slope mining requirements force the Commonwealth of Virginia to relinquish control over land-use planning, deprive the Commonwealth of authority over its economy, and cause actual economic harm (*id.* at 33a-39a). Relying heavily on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the district court held that the Surface Mining Act "operates to displace the states' freedom to structure integral operations in numerous areas of traditional functions" (App. C, *infra*, 19a).

The district court's decision misapplies *National League of Cities*; the Surface Mining Act regulates only coal mine operators, not states. Unlike the mandatory application of federal minimum-wage legislation to state employees, which the Court disapproved in *National League of Cities*, the steep-slope mining requirements of Sections 515(d) and (e) are directed

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slope above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or State." The term "approximate original contour" is defined in Section 701(2) of the Act. 30 U.S.C. (Supp. I) 1291(2). For a general description of surface mining methods, see H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 76-80 (1977).

Section 515(e) establishes a variance procedure by which an operator may obtain an exemption from the approximate original contour requirements of Section 515(d). In addition, Section 515(c) establishes a separate variance procedure applicable in cases in which an operator extracts coal, not by cutting into the side of a mountain, but by removing and leveling the mountain top. See H.R. Rep. No. 95-218, *supra*, at 101-103.

solely at private activities and do not seek to regulate the "States as States." See 426 U.S. at 845. As this Court emphasized in *National League of Cities* (*id.* at 840), the Tenth Amendment does not restrict Congress' power under the Commerce Clause to regulate nongovernmental activities.

> Congressional power over areas of private endeavor, even when its exercise may preempt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 262 (1964).

The district court unsuccessfully attempted to avoid the reasoning of *National League of Cities* by stating that, "[w]hile the act ultimately affects the coal mine operator, its pervasive effect is on the states' legislative authority and on state control of land within its boundaries" (App. D, *infra*, 32a). But the Act does not compel the states to enforce the steep-slope standards or to expend any state funds. The states are encouraged to enforce the Act's provisions, but there is no statutory requirement that the states enforce any particular standard. Furthermore, the regulation of surface coal mining is not the kind of integral governmental function protected by the Tenth Amendment. See *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 851. Regulation of surface coal

mining by the federal government does not threaten the states' "separate and independent existence." *Ibid.*

This reasoning is not affected by the district court's characterization of Sections 515(d) and (e) as land-use measures (App. D, *infra*, 34a-39a). The primary purpose of the steep-slope mining requirements is protection of the environment and the public health and safety. See H.R. Rep. No. 95-218, *supra*, at 80, 120; S. Rep. No. 95-128, 95th Cong., 1st Sess. 50-51 (1977). Any land-use consequences are altogether incidental, especially since the challenged subsections have as their goal the return of land to approximately the same condition as existed before mining began. Once reclamation is complete, the Commonwealth of Virginia and other states remain free to exercise their full powers over the restored land.

The remaining justification asserted by the district court for its Tenth Amendment ruling is that the steep-slope mining requirements will cause serious harm to Virginia's economy and will result in "destruction of the taxing power of certain counties, cities, and towns" (App. D, *infra*, 40a). This conclusion is based primarily on the district court's erroneous premise that the steep-slope requirements are "economically infeasible and physically impossible" (*id.* at 37a). Congress has made contrary findings about the practicability of Sections 515(d) and (e), and those findings are amply supported by the evidence in the legislative record (see page 22 & n.11 *infra*). Even assuming, however, that the Act's requirements will have a measurable impact on the economy of the Commonwealth, this kind of effect, standing alone,

is insufficient to establish a Tenth Amendment violation. In *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534-535 (1941), this Court rejected the theory that an adverse impact on state and local economies and tax revenues imposes a Tenth Amendment barrier to Congress' exercise of its power under the Commerce Clause. In *National League of Cities*, the Court discussed the possible economic impacts of the statute involved (426 U.S. at 846-847), but the Court made clear that the determinative factor was the nature of the federal action and its displacement of integral state functions, not its economic effect. *Id.* at 847. When a federal statute regulates a segment of interstate commerce without in any way forcing a state to participate in the endeavor, the Tenth Amendment is not offended. A contrary rule would distort the holding in *National League of Cities* and would create a serious obstacle to a wide variety of salutary federal economic legislation.

2. The district court's ruling that Sections 515(d) and 522(e) of the Act take private property without just compensation suffers from a fatal threshold deficiency. Neither plaintiffs nor the district court identified any particular piece of property in which plaintiffs have an interest that has allegedly been taken by operation of the statute. The district court rendered its decision under the Just Compensation Clause without reference to particular tracts of land or the extent of diminution in the value of such tracts attributable to the Act. Earlier this Term, the Court stressed the need to evaluate claims of government

takings on the basis of individualized findings regarding all relevant economic factors.

> [T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action —that have particular significance.

Kaiser Aetna v. *United States*, No. 78-738 (Dec. 4, 1979), slip op. 10 (citations omitted). In the absence of such an "ad hoc, factual inquiry," there is no reason to conclude that the Act will always effect a taking of private property, or, indeed, that it will ever do so. For this reason, the taking questions presented to the district court were not ripe for judicial determination.[10]

Nevertheless, the district court held that compliance with the "approximate original contour" requirement of Section 515(d) is "physically and economically im-

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[10] If plaintiffs' just compensation claims had focused on particular properties, resort to the variance procedures and other administrative remedies provided by the Act might have alleviated the alleged harm suffered and thus rendered a constitutional decision unnecessary.

possible" (App. D, *infra*, 45a) and that Section 515 (d) therefore effects a taking of private property without just compensation. The court's decision completely ignores Congress' explicit findings that restoration of steep-slope mines to their approximate original contour is feasible and economically practical. See H.R. Rep. No. 95-218, *supra*, at 120-124. After careful consideration of the available evidence, Congress concluded, not only that such restoration is physically and economically achievable,[11] but also that it was already being accomplished in some Appalachian states. *Id.* at 123-124.

Moreover, under the principles announced in *Goldblatt* v. *Town of Hempstead*, *supra*, once it has been established that a regulation serves a substantial public purpose (as the Act's requirements indisputably do), the only open question under the Fifth Amendment is whether the regulation prevents any beneficial use of the property. As the Court said earlier this Term in *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 14: "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." This principle is dispositive of plaintiffs' Just Compensation Clause challenge to Section 515(d). The statute does

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[11] We particularly invite the Court's attention to pages 98-100 of the House Report. These pages contain photographs of surface mining sites on steep slopes that have been successfully returned to approximate original contour. The results shown belie the district court's assertion that such restoration is physically impossible.

not preclude every use of plaintiffs' property; indeed, it does not preclude coal mining, or even surface coal mining. The Act merely imposes conditions that must be met by mine operators who wish to employ surface mining methods on steep slopes.[12] That is not enough to constitute a taking of private property. See *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-131 (1978); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922) (finding a taking where there was an actual physical restriction against the removal of coal).

Nor is any taking effected by Sections 522(e)(4) and (5). Those provisions are expressly made subject to valid existing rights and do not apply to coal mining operations existing on the date of enactment. Furthermore, the prohibitions against surface mining within a specified distance of dwellings, public buildings, parks, schools, churches, roads, and cemeteries do not prevent the use of underground mining methods, so long as there are no significant surface effects. The Act does not entail a complete prohibition on the removal of coal from the affected areas. Even if

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[12] Nearly 80% of Virginia's coal can be mined by underground methods. See United States Department of the Interior Federal Coal Management Program, *Final Environmental Statement*, Table 2-2 (1979), relying on a 1977 Bureau of Mines survey entitled *Demonstrated Coal Reserve Base of the United States as of January 1, 1976*. Accordingly, many steep-slope mine operators can avoid the "approximate original contour" requirement by employing a different mining technique.

it did, *Goldblatt* suggests that Section 522(e) would be valid as a reasonable exercise of the governmental power to protect the personal safety and health of the public. See 369 U.S. at 595. Plaintiffs bear the burden of establishing the unreasonableness of the statute,[13] and, at least where there has been no specific showing of the impact of the statute on the value and beneficial uses of a particular tract, a reviewing court should not conclude that "the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co., supra,* 428 U.S. at 15.[14]

3. The district court's due process rulings were both premature and incorrect. Plaintiffs did not allege that they, or any one of them, received a summary cessation order under Section 521(a)(2) or a demand for payment of civil penalties imposed without a hearing. Accordingly, plaintiffs have suffered no denial of due process, and the district court should

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[13] See, *e.g., Bibb* v. *Navajo Freight Lines,* 359 U.S. 520, 529 (1959); *Salsburg* v. *Maryland,* 346 U.S. 545, 553 (1954); *United States* v. *Carolene Products Co.,* 304 U.S. 144, 154 (1938).

[14] Because the district court objected only to provisions contained in Section 522(e), it is unclear why the court's order (App. C, *infra,* 19a) declares all of Section 522 unconstitutional. This aspect of the court's order is especially puzzling because Sections 522(a)-(d) do not become applicable to state and private land until the permanent phase of the Act's regulatory program. These provisions, which establish procedures for designating particular lands as unsuitable for some or all surface mining, have not been applied to plaintiffs or any other private landowners. Accordingly, no justiciable case or controversy exists with respect to Sections 522(a)-(d). *United Public Workers* v. *Mitchell,* 330 U.S. 75, 89-91 (1947).

not have considered their procedural objections to the operation of the Act. The adequacy of enforcement devices established by Congress should not be determined in the absence of a concrete case or controversy. The question of what process is due in a given situation depends in large measure on the particular circumstances involved. For example, the propriety of a summary cessation order will inevitably vary with the gravity of the threat posed by particular surface mining practices and conditions. Without some allegation and showing that the parties challenging the Act's cessation order and civil penalty provisions have suffered or will suffer harm as a consequence of those procedures, a reviewing court should not disturb the enforcement scheme carefully designed by Congress. In any event, neither provision invalidated by the district court is constitutionally defective.

a. The issuance of immediate cessation orders authorized by Section 521(a)(2) fits comfortably within the lengthy line of precedents holding that due process does not always require a prior hearing. This Court has frequently recognized that, in extraordinary and emergency situations, summary administrative action may be justified. See, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-680 (1974); *Boddie* v. *Connecticut*, 401 U.S. 371, 378-379 (1971); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950); *Yakus* v. *United States*, 321 U.S. 414, 442-443 (1944), and cases there cited; *Phillips* v. *Commissioner*, 283 U.S. 589, 595-599 (1931); *North American Cold Storage Co.* v.

City of Chicago, 211 U.S. 306 (1908); *Lawton* v. *Steele*, 152 U.S. 133, 140-142 (1894).

In view of the devastating effects of mining disasters, Congress has determined that, in situations involving "imminent danger" to the public health or safety or "significant, imminent environmental harm," the Secretary should be empowered to order an immediate halt to the offending practice or condition. A mine operator aggrieved by such a cessation order may seek temporary relief from the Secretary, and the Secretary must act on such a request within five days of its receipt. See 30 U.S.C. (Supp. I) 1275 (c).[15] If the Secretary denies temporary relief, his action is subject to judicial review under Section 526 (c) of the Act, 30 U.S.C. (Supp. I) 1276(c). Moreover, the cessation order itself is subject to both informal review under Section 521(a)(5), 30 U.S.C.

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[15] The district court held (App. D, *infra*, 73a) that, when the Secretary receives a request for temporary relief from a cessation order, he "should have to grant or deny it within twenty-four (24) hours, rather than five days." The court explained that, in its view, the "five-day lapse may be crucial to the continuation of a coal mine, especially considering the length of time it may take to get a request to the Secretary" (*ibid.*). This aspect of the district court's opinion is an undisguised and unsupportable substitution of a judicial policy preference for that of Congress. Plaintiffs did not demonstrate that the five-day reply period affected them adversely in a particular case or is generally unreasonable. They also introduced no evidence tending to show that a shorter reply period is administratively feasible. The district court record simply provides no basis for the conclusion that the five-day reply period allowed by Section 525(c) offends the requirements of due process.

(Supp. I) 1271(a)(5),[16] and formal review, including an adjudicatory hearing, under Section 525(b), 30 U.S.C. (Supp. I) 1275(b). The statute thus strikes a reasonable legislative balance between the legitimate desire of private enterprise to be heard before submitting to administrative regulation and the overriding governmental interest in protecting the public and the environment from dangerous conditions.

The district court did not disagree with the proposition that, in an emergency setting, the Fifth Amendment tolerates some governmental interference with private property prior to a hearing (App. D, *infra*, 63a-64a, 71a-72a). Nor did the court question the importance of the interests sought to be protected by the statutory enforcement scheme. The court ruled, however, that Section 521(a)(2) is unconstitutional because it does not provide sufficiently objective criteria for summary administrative action.[17]

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[16] Section 521(a)(5) provides that any notice or order that requires the cessation of mining shall automatically expire within 30 days, "unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of public hearing."

[17] Section 701(8) of the Act, 30 U.S.C. (Supp. I) 1291(8), defines "imminent danger to the health and safety of the public" as follows:

> the existence of any condition or practice, or any violation of a permit or other requirement of this chapter in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons

The court cited no authority for this holding, and its decision appears to have been based on a conviction that some mine operators have sustained economic harm as the result of summary cessation orders subsequently overturned on administrative appeal. But the possibility of administrative error inheres in any regulatory system; statutory programs authorizing emergency administrative action prior to a hearing are no exception. As this Court explained in *Ewing* v. *Mytinger & Casselberry, Inc., supra,* 339 U.S. at 599:

> Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.

The relevant inquiry is not whether a summary cessation order should have been issued in a particular case but whether the statutory procedure itself

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outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement.

See also 30 C.F.R. 700.5, 42 Fed. Reg. 62676 (1977) (interim regulation defining both "imminent danger" to the public health and safety and "significant, imminent environmental harm").

is incapable of affording due process. *Yakus* v. *United States, supra,* 321 U.S. at 434-435.

The standards for issuance of immediate cessation orders under Section 521(a)(2) are quite similar to the criteria provided by Congress in other instances where statutory provisions allowing summary administrative action have been upheld against due process challenges. See, *e.g., Ewing* v. *Mytinger & Casselberry, Inc., supra,* 339 U.S. at 595 ("dangerous to health * * * or would be in a material respect misleading to the injury or damage of the purchaser or consumer"); *Fahey* v. *Mallonee,* 332 U.S. 245, 250-251 n.1 (1947) ("is unsafe or unfit to manage a Federal savings and loan association" or "[i]s in imminent danger of becoming impaired"); *Air East, Inc.* v. *National Transportation Safety Board,* 512 F.2d 1227, 1232 (3d Cir.), cert. denied, 423 U.S. 863 (1975) ("emergency requiring immediate action * * * in respect to air safety in commerce").

Perhaps most pertinent to the present case is *Sink* v. *Morton,* 529 F.2d 601 (4th Cir. 1975), which rejected a mine operator's due process attack on the constitutionality of summary enforcement provisions in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 814.[18] Section 814(c) of the Mine Safety Act permitted a federal inspector to order the immediate withdrawal of all persons from a mine at which he found two or more unwarranted viola-

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[18] The Act was substantially amended by the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290. See 30 U.S.C. (Supp. I) 814.

tions of mandatory health or safety standards, at least one of which "could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *." The inspector was not required to find that a violation could cause "imminent danger." [19] The court of appeals held that the issuance of withdrawal orders without a prior hearing did not violate the Due Process Clause. Although the Secretary relied heavily on *Sink* in the district court in the present case, the court ignored the Fourth Circuit precedent. In addition, the district court explicitly rejected the holding in *In re Surface Mining Regulation Litigation*, 456 F.Supp. 1301, 1319-1322 (D.D.C. 1978), appeal pending on unrelated issues, Nos. 78-2190, 78-2191, 78-2192 (D.C. Cir. argued June 5, 1979), sustaining Section 521(a)(2) and the Secretary's implementing regulations against a due process challenge identical to that involved here.[20] See also *Star Coal Co.* v. *Andrus*,

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[19] Section 814(c) has been redesignated as Section 814(d). 30 U.S.C. (Supp. I) 814(d).

Section 814(a), as enacted in 1969, provided for the summary issuance of an order requiring the immediate withdrawal of all persons from a coal mine in which a federal inspector found an "imminent danger." As amended by the Federal Mine Safety and Health Act of 1977, Section 814(a) no longer provides for "imminent danger" withdrawals. 30 U.S.C. (Supp. I) 814(a). The subsection was not at issue in *Sink*.

[20] Section 526(a)(1) of the Act provides that the United States District Court for the District of Columbia shall have exclusive jurisdiction to review the Secretary's national regulations for both the interim and the permanent phase of the statutory program. 30 U.S.C. (Supp. I) 1276(a)(1).

Civ. No. 79-171-2 (S.D. Iowa Feb. 13, 1980), slip op. 17-18 (upholding Section 521(a)(2) against due process attack).

By requiring more "objective" standards for the issuance of summary cessation orders, the district court improperly substituted its personal views for the considered congressional judgment that "inspectors are in the best position to recognize and control compliance problems." S. Rep. No. 95-128, *supra*, at 90. As the Senate Committee emphasized (*id.* at 91), individual on-site determinations are indispensable because "neither the Congress nor any regulatory authority can totally predict the public and environmental hazards arising from such a complex endeavor as surface coal mining * * *." If the approach adopted by the district court were followed, Congress would be faced with the impossible task of describing in detailed (and perhaps quantifiable) terms every conceivable situation in which an imminent threat to the public health or safety or to the environment might arise. The Due Process Clause imposes no such requirement.

b. The district court's ruling that the Act's civil penalty provisions violate the Due Process Clause appears to be based on a misunderstanding of the statute. No penalties are finally imposed under Section 518 until the alleged offender has been afforded an opportunity for a hearing. Section 518(b) leaves no room for doubt on this point: "A civil penalty shall be assessed by the Secretary only after the

person charged with a violation * * * has been given an opportunity for a public hearing."

Although final assessment of a civil penalty cannot occur until an opportunity for a hearing has been provided, Section 518(c) directs the Secretary, within 30 days of a notice of violation or a cessation order, to inform the mine operator of the proposed amount of the civil penalty to be assessed. Section 518(c) further requires that, if the operator "wishes to contest either the amount of the penalty or the fact of the violation," he must "forward the proposed amount to the Secretary for placement in an escrow account." If, after administrative or judicial review, it is determined that no violation occurred or that the proposed penalty should be reduced, the appropriate amount is promptly returned to the operator with interest.

The district court appears to have confused the actual assessment of a civil penalty, *i.e.*, the entry of a final administrative order, with the Secretary's initial notice to the operator of the amount of the proposed penalty. See App. D, *infra*, 67a-68a & n.20. Furthermore, the district court ignored the requirement in the Secretary's regulations that, if requested by the operator, a conference must be held prior to the time that a proposed penalty is to be paid into an escrow account. 30 C.F.R. 723.17, 42 Fed. Reg. 62703-62704 (1977). Thus, in every instance, the operator will have an opportunity to be heard, even before the temporary deprivation involved in payment of a proposed penalty.

Section 518's requirement that a proposed penalty be placed in escrow before a mine operator can obtain a hearing on the amount of the penalty does not deny plaintiffs due process of law. The Senate Committee Report explains that the requirement was included in Section 518(c) in order to "avoid the problem of noncollection of fines." S. Rep. No. 95-128, *supra*, at 59. The provision is a reasonable solution designed to eliminate the difficulty identified by Congress without imposing significant burdens on mine operators. In the absence of some particularized showing that the statute creates unfair hardship in a given set of circumstances, there is no reason to believe that a mine operator will be harmed by the statutory procedure. The "refund-with-interest" provision in Section 518(c) ensures that operators who prevail on administrative or judicial review will suffer no financial injury. As Mr. Justice White wrote in *Arnett* v. *Kennedy*, 416 U.S. 134, 187 (1974) (concurring and dissenting opinion), "[i]n passing upon claims to a hearing before preliminary but nonfinal deprivations, the usual rule of this Court has been that a full hearing at some time suffices." See *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*; *Phillips* v. *Commissioner*, *supra*; *North American Cold Storage Co.* v. *City of Chicago*, *supra*; *Scottish Union & National Insurance Co.* v. *Bowland*, 196 U.S. 611, 631-632 (1905); *Springer* v. *United States*, 102 U.S. 586, 593-594 (1881); *Sink* v. *Morton*, *supra*, 529 F.2d at 604 ("Due process does not command that the right

to a hearing be held at any particular point during the administrative proceedings; it is satisfied if that right is given at some point during those proceedings").[21] The civil penalty provisions of the Surface Mining Act therefore do not violate the Due Process Clause.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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APRIL 1980

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[21] But see *Star Coal Co.* v. *Andrus*, *supra*, slip op. 18-19 (concluding that there is a substantial likelihood that the escrow requirement in Section 518(c) violates due process).

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civ. O.B. #2, p. 158

Civil Action No. 78-0224-B

[Filed Jan. 21, 1980]

VIRGINIA SURFACE MINING AND RECLAMATION ASSN., INC., ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary, Department of Interior, ET AL., DEFENDANTS

ORDER

This cause came on to be heard again upon the defendant's motion for a stay pending appeal pursuant to Rule 62(c). It appearing to the court from affidavits filed in support of the motion for a stay that this court's Order of January 3, 1980, needs clarification and modification, it is hereby ADJUDGED and ORDERED that Paragraphs 5 and 8 of the Order of January 3, 1980, be and the same are hereby amended to read as follows:

(5) The Surface Mining Control and Reclamation Act operates to displace the states' freedom to structure integral operations in numerous areas of tradi-

tional functions and is in contravention of the Tenth Amendment; however, the court is of the opinion that the interests of the state and federal government must be balanced to determine the appropriate relief to be granted. The portions of the act requiring steep slopes to be restored to approximate original contour are not environmentally sound and do not serve the interests of the federal government and are so burdensome on the Commonwealth of Virginia as to threaten its economy. The federal government will not be harmed by the permanent injunction of this provision of the act, therefore, it is hereby ADJUDGED and ORDERED that § 515(d) of the act, 30 U.S.C. § 1265(d), (e), are hereby permanently enjoined.

This portion of the Order enjoining § 515(d) and (e), 30 U.S.C. § 1265(d), (e), shall not be construed as allowing spoil to be placed on the downslope in an uncontrolled manner. Any such downslope spoil placement shall be in a controlled manner meeting environmental protection standards specified by the regulatory authority.

(8) The act also provides for summary issuance of cessation orders and civil penalties, which have been shown to deprive mine operators of procedural due process of the law as guaranteed by the Fifth Amendment. Therefore, § 518, 30 U.S.C. § 1268, § 521, 30 U.S.C. § 1271, and § 525, 30 U.S.C. § 1275, are permanently enjoined *only* insofar as those sections relate to summary issuance of cessation orders

and civil penalties. Cessation orders and civil penalties may be issued in accordance with the opinion of this court entered on January 3, 1980. This order does not affect issuance of violation notices under § 521 or their review under § 525.

The Commonwealth of Virginia has requested the court to amend its Order of January 3, 1980, to rule upon the complaint filed by the Commonwealth of Virginia pertaining to cut-off of funds which is contained in a supplemental complaint in this cause. A motion was made on page 1073 of the Record to place this amended complaint on the inactive docket and make no ruling on the same at that time, therefore, it is hereby ORDERED that the supplemental complaint of the Commonwealth of Virginia be placed on the inactive docket to be reinstated upon a proper motion by the Commonwealth of Virginia.

The defendants' motion for a stay pending appeal is hereby DENIED.

The Clerk of this court is directed to send certified copies of this Order to counsel of record.

ENTER: This 21 day of January, 1980.

/s/ Glen M. Williams
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Action No. 78-0224-B

[Filed Jan. 21, 1980]

VIRGINIA SURFACE MINING AND RECLAMATION ASSN., INC., ET AL., PLAINTIFFS

TOWN OF WISE, VIRGINIA, INTERVENOR-PLAINTIFF

COMMONWEALTH OF VIRGINIA, INTERVENOR-PLAINTIFF

v.

CECIL D. ANDRUS, Secretary, Department of Interior, ET AL., DEFENDANTS

MEMORANDUM OPINION

Defendant in the above styled case has moved the court for an Order staying enforcement of the Final Order entered herein on January 3, 1980, pending the disposition of appellate review. Defendant has also requested expeditious consideration of the motion for stay, and has submitted affidavits of Walter N. Heine, Director, Office of Surface Mining Reclamation and Enforcement, and Patrick B. Boggs, Deputy Director, Region 1, Office of Surface Mining Reclamation and Enforcement, in support of the motion. Plaintiffs have submitted the affidavits of

Danny R. Brown, Commissioner of Virginia's Division of Mined Land Reclamation of the Department of Conservation and Economic Development, and J. Steven Griles, Executive Assistant of Virginia's Department of Conservation and Economic Development, in support of their opposition to defendant's motion for stay.

A party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay. *Long* v. *Robinson*, 432 F.2d 977 (4th Cir. 1970). Because it is this court's firm belief that plaintiff interest will be substantially harmed by operation of a stay, for reasons stated below and in previous opinions, and that the defendant's and public's interest will not be harmed by a stay, the motion for a stay is denied. The court, however, will clarify part of its Order of January 3, 1980, to correct any misunderstandings, as will be explained below.

The United States Court of Appeals for the Fourth Circuit cautions that a district court judge must give applicants for a stay "full opportunity to develop the facts with regard to a stay beyond those which were adduced at the trial." 432 F. 2d at 979. Consequently, the court will closely examine the affidavits submitted with the motion.

The court notes at the outset that the above case has been pending before this court since October 23,

1978, and the court has received in evidence fourteen volumes of testimony and hundreds of exhibits. Numerous witnesses, many of whom are experts, have submitted themselves to cross examination, and during that time neither Mr. Heine nor Mr. Boggs has appeared before this court to be cross-examined, but have submitted affidavits. While the court will duly consider these affidavits, they must be examined along with the evidence of witnesses who have appeared in person and have been cross-examined.

Mr. Heine, in his affidavit, outlines his experience in Pennsylvania in the coal industry and as a state official in Pennsylvania up until 1977, and based on this experience expresses an opinion that the return to approximate original contour is environmentally sound and can be achieved both physically and economically. As part of his credentials, Mr. Heine points out that he helped draft the law that is before the court and is currently director of the Office of Surface Mining Reclamation and Enforcement.

Mr. Heine's affidavit illustrates quite vividly the problem inherent in the act, namely, that a program which worked well for Mr. Heine in Pennsylvania, does not work the same in a state such as Virginia. Therefore, in drafting the act, Mr. Heine foisted upon Virginia a program that was well suited to Pennsylvania but disastrous to Virginia. Part of the evidence presented in this case *by the federal government* was the testimony of Billy R. Loughry, a strip miner from Rochester Hills, Pennsylvania. Mr.

Loughry testified that he has mined successfully in Pennsylvania and met the requirements of return to approximate original contour, elimination of highwalls, and no placement of spoil on the downslope, and has made a profit. Mr. Loughry further testified, after observing the terrain in Virginia and the overburden, that it would be physically impossible to make a complete backfill and restore to the approximate original contour on Virginia's steep slopes, and that it would be impossible "to make any money at all." (T. 1822-1842).

The evidence presented to this court overwhelmingly indicates that restoring mined land to approximate original contour on steep slopes is not environmentally sound, *e.g.*, testimony of Benjamin C. Green, T. at 2532-2610; Donald Clay Haney, T. at 2611; John D. Robins, T. at 2644-2673; Richard G. Alnes, T. at 2690-2705; Richard M. Smith, T. at 617-630, and that it increases erosion and creates a dangerous mass that causes the sediment to flow down mountains and fill streams. In addition, as the court cited in its opinion in this case, studies made for the Department of Interior and Congress show that restoration to approximate original contour is environmentally unsound. Therefore, this court is inclined to believe those witnesses who have testified and been cross-examined rather than those who had the opportunity to testify and chose to file affidavits.

Mr. Heine also maintains in his affidavit that the Order of this court enjoining § 515(d) and (e), 30 U.S.C. § 1265(d), (e), allows the operators to place

spoil on the downslope of a steep slope mining operation. Mr. Heine's reading of this court's opinion is overbroad, and is contrary to the opinion of John R. Woodrum, an attorney with the Office of the Solicitor, U. S. Department of the Interior, who informed Dr. Charles A. Beasley, Acting Regional Director of OSM, in a memorandum regarding this court's opinion that the "requirement that all spoil be disposed of in the mine workings or in an approved fill area remain[s] intact." [1] The court's opinion does not enjoin the prohibition against placement of spoil on the downslope; § 515(d) and (e) is enjoined insofar as it requires a return of mined land on steep slopes to approximate original contour or elimination of all highwalls. To prevent the confusion, however, that is apparent from the divergence of opinion between Mr. Heine's affidavit and Mr. Woodrum's memorandum, the court will clarify its Order to make it clear that the portion of the Order enjoining § 515(d) and (e), 30 U.S.C. § 1265(d), (e), should not be construed as allowing spoil to be placed on the downslope in an uncontrolled manner.

With regard to Mr. Heine's comments regarding § 522, 30 U.S.C. § 1272, the court has not enjoined this section, but rather has issued a declaratory judgment on its constitutionality. The court has no quarrel with Mr. Heine's comments that in many instances

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[1] Mr. Woodrum's memorandum was submitted to the court as part of the affidavit of J. Steven Griles, Executive Assistant of Virginia's Department of Conservation and Economic Development.

serious injury may be caused by mining near dwellings, roads, churches, and graveyards. On the other hand, mining may also be conducted in those areas without harm to anyone. At any rate, the complete prohibition of mining in these areas constitutes a "taking" under the Fifth Amendment when no compensation has been made. If the federal government wants all surface mining stopped in Virginia, it has the power to do so by exercising its power of eminent domain and paying for the property. Mr. Heine obviously is one of those bureaucrats referred to in the court's opinion who thinks nothing of depriving people of their property to accomplish his own ideas of what is right for society in general. One wonders if he would feel the same if his property were taken by the federal government.

Mr. Heine attaches with his affidavit a letter from William G. Kenton, a member of the Kentucky House of Representatives, addressed to the Attorney General of Kentucky requesting that a suit be instituted by Kentucky similar to the suit before this court. Mr. Heine attaches the letter to demonstrate another element of irreparable harm that will result from the court's order: "unfair competitive advantage that was obtained by Virginia operators as a result of the Order." The thrust of Mr. Kenton's letter, however, is to say that Virginia and Indiana have filed suit, therefore, why hasn't Kentucky? It is the act Mr. Kenton complains of and not this court's decision. He states that Kentucky has suffered intolerable unemployment in the coal counties and that Kentucky faces

a similar if not identical threat to its economy as a result of the act. The defendant has argued throughout this case that the act poses no threat to the economy and is going smoothly in other states. Mr. Kenton's letter also supports the opinion of this court that the federal act affects the state as a sovereign entity and not just private interests. He states as follows: "the health of Kentucky's coal industry will have a direct bearing on the ability of the 1980 session of the General Assembly to fund important and necessary programs throughout our Commonwealth." The federal act does, as Mr. Kenton states, affect the state of Kentucky as a state, just as it affects Virginia as a state.

The court will now examine the affidavit of Patrick B. Boggs, Deputy Director of OSM, Region 1. Mr. Boggs has held this position since May 1979. Prior to May 1979, Mr. Boggs was Deputy Director of the West Virginia Department of Natural Resources beginning in 1977. In paragraph 9 of Mr. Boggs' affidavit, Mr. Boggs generalizes that operators in West Virginia have had no problems eliminating highwalls and restoring to approximate original contour. Mr. Boggs' predecessor as Deputy Director of West Virginia Department of Natural Resources, Mr. Green, testified in person at the trial of this case and was cross-examined. Mr. Boggs' conclusions are contradictory to the sixty pages of Mr. Green's testimony. Mr. Green testified that he was one of the leading advocates of federal legislation regulating surface mining and had helped to draft the 1963, 1967, 1971,

1976, and 1977 amendments to the West Virginia Surface Mining Act. Prior to the passage of the federal act for the period 1971 to 1977, West Virginia had a system that permitted leaving a maximum of thirty feet of the highwall. The spoil material was stacked against the highwall but not to the top and a drainage ditch was cut above the highwall. Mr. Green testified that approximate original contour "is a misnomer and an impossible situation from an environmental point of view, if you take the material to the top of the wall, you blend in and complement the surrounding slopes, then you have greatly accelerated the erosion and sediment control problems that you are, of course, duty bound to prevent." T. at 2544. After the federal act went into existence, West Virginia dropped from being number one coal producer in the nation to number three, and the level of production dropped to that of 1922. At the time of trial in this case, six thousand miners were unemployed in the state; mining on the steep slopes of West Virginia had been drastically scaled back since the federal act came into being. The court feels compelled to accept the testimony of Mr. Green who appeared before this court, as opposed to the affidavit of Mr. Boggs.

In paragraph 10 of Mr. Boggs' affidavit he questions the accuracy of this court's summary of the evidence regarding Black Creek Mining Company. This is the first contradiction offered to this testimony, which was presented on February 13, 1979. At that time, the federal inspector involved in this incident,

Douglas Stone, was present and testified and did not dispute it. The Commonwealth of Virginia has contradicted Mr. Boggs' statement; the company is not operating in Virginia, rather a subcontractor is presently mining the permit. *See* affidavit of Danny R. Brown at 9.

The principal thrust of Mr. Boggs' affidavit is that this court's injunction prevents the federal government from enforcing the act. This is also contained in Mr. Heine's affidavit, p. 5 and 6. It is not the court's intention to prevent the OSM from enforcing the act. There is no logical reason OSM cannot fully enforce the act, and at the same time afford the mine operators due process. The court has enjoined the summary issuance of cessation orders and fines without a hearing. In the event this court's order has been misunderstood, the court will modify its order so that it will be clear that OSM *can* issue cessation orders and levy penalties if a timely due process hearing is provided in accordance with the court's Memorandum Opinion issued on January 3, 1980, and that issuance of violation notices has not been affected by the Order.

Without attempting to enumerate all the powers inspectors have which are not enjoined by the court, the court will point out a few left to OSM during the interim period: (1) the power to issue violation notices under § 521, 30 U.S.C. § 1271; (2) the power to issue cessation notices and levy penalties in accordance with this court's opinion of January 3, 1980; (3) the power to suspend or revoke permits, 30

U.S.C. § 1271(a)(4); the power to have the Attorney General get injunctive relief in U. S. district courts for all types of violations of the act, 30 U.S.C. § 1271(c).

In spite of the foregoing powers, Mr. Boggs has stated under oath and released the statement to the press and television throughout the country that the "public health and safety will be adversely affected by the absence of OSM enforcement capability in Virginia." In addition to the powers enumerated above, OSM may still regulate surface mining in Virginia under the interim program in many harsh ways in which surface miners, according to the evidence, will have the utmost difficulty complying with, *e.g.*, restoration of land to uses which it was capable of supporting prior to any mining, or a higher or better use; restoration to approximate original contour and elimination of highwalls on all slopes subject to variances to be permitted by proper authority; strict provisions for removal of topsoil; strict drainage regulation; regulation of explosives and blasting; and, revegetation responsibility.

In conclusion, it is this court's opinion that defendant has failed to sustain the burden of proof that must be met before its motion for a stay can be granted. The statements of Mr. Heine and Mr. Boggs concerning the environmental harm that will result from the injunction fail to overcome the voluminous testimony to the contrary that was placed before this court. In addition, defendart argues that the federal

government will be unable to enforce the Surface Mining Control and Reclamation Act of 1977. Review of the act reveals that most of the powers granted to the regulatory agency are left intact by the court's opinion. OSM can still grant cessation orders or levy penalties provided that the operators are given full and adequate opportunity to be heard. The approximate original contour provision, which was struck down on two constitutional grounds, has been shown to be unsuited to Virginia's terrain and environmentally unsound. It is common sense that if you pour a glass of water on a mountain with a steep slope and loose dirt, the faster the run-off, the greater the pollution; on the other hand, if you step the water down by having benches to slow the run-off, the slower the water, the less the sediment. Furthermore, there are many powers left to the government to enforce the act. Defendant has, therefore, failed to prove that it will suffer irreparable injury if the stay is denied and that the public interest will best be served by granting the stay. Indeed, this court must conclude that the public interest will best be served by a refusal to stay the judgment.

In addition, defendant has failed to show that it will likely prevail on the merits of its appeal, not having submitted any argument or evidence on this point. The court feels its decision of January 3, 1980, was correct, and the defendant has not changed the court's opinion on the constitutional questions involved.

Defendant raises one additional point that the court feels compelled to comment on. Mr. Boggs contends in his affidavit that the Commonwealth of Virginia has failed to adequately enforce the reclamation laws and also lacks the enforcement tools with which to deal with the problems raised by surface mining. The state officials who represent the Commonwealth in this matter vigorously deny this, see affidavits filed on January 18 and 21, 1980, and have made accusations that the federal government has hired their inspectors by offering more pay and that OSM has failed to cooperate with them. This is not an issue before this court; however, it is difficult to understand OSM's complaint, assuming it is true, since OSM will have total power to eliminate the state from any control, if it determines the act will be inadequately enforced. Furthermore, by January of 1981 the federal government will either approve or disapprove the permanent state program. If the program is not approved, then the federal government can refuse to turn control over to the state, and the state can sue in federal court in Richmond to decide the issue. At that time, this issue will properly be before a United States district court.

For the reasons stated above, and because plaintiffs will suffer irreparable injury if a stay is granted, defendant's motion will be denied. An Order will be entered clarifying and modifying Paragraphs 5 and 8 of the Order dated January 3, 1980, and denying the motion for a stay.

The Clerk of this court is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 21st day of January, 1980.

/s/ Glen M. Williams
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Action No. 78-0224-B

[Filed Jan. 3, 1980]

VIRGINIA SURFACE MINING AND RECLAMATION ASSN., INC., ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary, U. S. Department of the Interior, ET AL., DEFENDANTS

FINAL ORDER

In accordance with a Memorandum Opinion filed this day that contains this court's findings of fact and conclusions of law, it is hereby ruled and ORDERED that:

(1) Defendants' motion to dismiss is overruled.

(2) Since none of the plaintiffs have clearly shown that they are aggrieved by Title IV of the Surface Mining Control and Reclamation Act of 1977, relating to abandoned mine reclamation, and since the facts concerning this portion of the act are not fully articulated, this court makes no ruling regarding any of the constitutional aspects of this portion of the act.

(3) This court has jurisdiction over all parties and

all issues involved in this case; the plaintiffs have standing to adjudicate all issues raised in this case; all issues are considered ripe for adjudication; and plantiffs are not required to exhaust administrative remedies.

(4) Title V of the Surface Mining Control and Reclamation Act is hereby declared to be a valid exercise of the power of Congress to regulate interstate commerce and is rationally based.

(5) The Surface Mining Control and Reclamation Act operates to displace the states' freedom to structure integral operations in numerous areas of traditional functions and is in contravention of the Tenth Amendment; however, the court is of the opinion that the interests of the state and federal government must be balanced to determine the appropriate relief to be granted. The portions of the act requiring steep slopes to be restored to approximate original contour are not environmentally sound and do not serve the interests of the federal government and are so burdensome on the Commonwealth of Virginia as to threaten its economy. The federal government will not be harmed by the permanent injunction of this provision of the act, therefore, it is hereby ADJUDGED and ORDERED that § 515(d) and (e) of the act, 30 U.S.C. § 1265(d), (e), are hereby permanently enjoined.

(6) Title V of the Surface Mining and Reclamation Act of 1977 is hereby determined and adjudged not to be in contravention of the equal protection and

substantive due process provisions of the Fifth Amendment.

(7) Section 515, 30 U.S.C. § 1265, and § 522, 30 U.S.C. § 1272, effectively prohibit the mining of a person's private porperty, thereby resulting in a physical property restriction and a nearly complete diminution in the value of the land, as well as loss of future profits. Therefore, § 515(d) and (e), 30 U.S.C. § 1265(d), (e), and § 522, 30 U.S.C. § 1272, and any other provision of 30 U.S.C. § 1265 that by inference may require restoration of steep slopes to approximate original contour, are hereby declared and adjudged to be unconstitutional as a taking of private property without just compensation in contravention of the Fifth Amendment of the United States Constitution, until such time as the federal government sees fit to obtain said land by eminent domain and payment of just compensation.

(8) The act also provides for summary issuance of cessation orders and civil penalties, which have been shown to deprive mine operators of procedural due process of the law as guaranteed by the Fifth Amendment. Therefore, § 518, 30 U.S.C. § 1268, § 521(a)(1)-(3), 30 U.S.C. § 1271(a)(1)-(3); and § 525, 30 U.S.C. § 1275, are permanently enjoined.

The court, having ruled on all issues deemed appropriate in this cause, ORDERS that the case be stricken from the docket.

The Clerk of this court is directed to send certified copies of this Final Order to counsel of record.

ENTER: This 3 day of January, 1980.

/s/ Glen M. Williams
United States District Judge

A TRUE COPY, TESTE:
JOYCE F. WITT
Clerk

By: /s/ J. Todd
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Action No. 78-0224-B

[Filed Jan. 3, 1980]

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary, U. S. Department of the Interior, ET AL., DEFENDANTS

MEMORANDUM OPINION

This is an action in which plaintiffs seek a judgment declaring that various provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328, are unconstitutional and an injunction to prevent the Secretary of the Department of the Interior from enforcing those provisions. Plaintiffs, including intervenors, are the Virginia Surface Mining and Reclamation Association, Inc., which is a voluntary association of coal producers engaged in surface coal mining operations in the Commonwealth of Virginia, sixty-three member coal companies, four individual landowners, the Town of Wise, Virginia, and the Commonwealth of Virginia. Plaintiffs assert that the act is neither authorized by the commerce

clause nor any other provision of the Constitution and is not rationally based; that the act is in contravention of the Tenth Amendment; that the act disproportionately affects the interests of southwest Virginia coal mine operators and is not rationally based and is, therefore, in violation of the equal protection and substantive due process guarantees of the Fifth Amendment; that the act constitutes a taking of private property without just compensation in violation of the Fifth Amendment; and that certain enforcement provisions of the act violate the procedural due process requirement of the Fifth Amendment. A trial on the merits having been concluded, the matter is now before the court for final disposition.

The Surface Mining Act is a comprehensive statute designed to provide a set of national environmental performance standards to be applied principally to coal surface mining operations and to be enforced by the state with backup authority in the Department of the Interior, acting through the newly created Office of Surface Mining Reclamation and Enforcement. The act establishes a two-tier regulatory program designed to implement its objectives. Section 501(a) of the Act, 30 U.S.C. § 1251(a), required the Secretary to promulgate regulations establishing an interim regulatory program for surface coal mining and reclamation performance standards used on and incorporating the provisions set out in § 502(c) of the act, 30 U.S.C. § 1252(c), and any other provisions that the act makes immediately effective. The performance standards required by the act during

this first-tier interim regulatory phase, which is now in effect, include provisions for the restoration of land to its prior condition, restoration of land to its approximate original contour, segregation and stabilization of topsoil, minimization of disturbances to the hydrologic balance and to water quality, the construction of coal mine waste piles used as dams and embankments, the use of explosives, revegetation of mined areas, and spoil disposal. § 515(b), 30 U.S.C. § 1265(b). *See* note 14 *infra*. New surface coal mining operations commencing on or after February 3, 1978, were required to comply with the performance standards of the interim regulations when the operations began and all surface mining operations that commenced prior to February 3, 1978, with certain limited exceptions, were required to comply with the performance standards of the interim program by May 3, 1978. § 502(c), 30 U.S.C. § 1252(c). The second-tier regulatory program, the permanent program, is not scheduled to go into effect until June 3, 1980, and is, therefore, not in issue.

In addition to establishing environmental performance standards applicable to all surface mining operations, Title IV of the act, §§ 401-413, 30 U.S.C. §§ 1231-1243, establishes an abandoned mine reclamation program. In the exercise of its discretion, however, the court will not grant declaratory judgment as to the provisions of that title. While plaintiffs have launched a broad-based constitutional attack on the act in its entirety, the thrust of their challenge has been directed particularly to the con-

stitutionality of Title V of the act, §§ 501-529, 30 U.S.C. §§ 1251-1279, which sets forth the authority to regulate surface mining, the environmental protection standards, and the pertinent procedural and enforcement mechanisms of the act. Very little, if any, challenge has been mounted to the provisions for abandoned mine reclamation. The issues involved in plaintiff's challenge to Title V, although similar in certain respects, are clearly separable from the issues involved in plaintiffs' challenge to Title IV. Likewise, the provisions of each title are such that constitutional questions regarding one do not of necessity implicate the other. Furthermore, it is the expressed intention of Congress that the provisions of the act be treated as severable so that a determination that any particular provision is invalid will leave intact the remainder:

> If any provision of this Act or the applicability thereof to any person or circumstances is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Title VII, § 707, 30 U.S.C. § 1297. As the present action is one for declaratory relief under 28 U.S.C. § 2201, the granting of relief rests in the sound discretion of the trial court exercised in the public interest. *Brillhart* v. *Excess Insurance Co.*, 316 U.S. 491 (1942). It is within the discretion of the district court, therefore, to deny declaratory relief as to any matter which the court finds not to be clearly articu-

lated. *See Public Affairs Press* v. *Rickover*, 369 U.S. 111 (1962); *Eccles* v. *Peoples Bank*, 333 U.S. 426 (1948). As the court finds the questions concerning Title V of the act to be capable of resolution without regard to Title IV, and as the court finds the challenges to the latter to be less than clearly presented, declaratory relief as to the validity of Title IV will be denied.

I.

EXHAUSTION OF ADMINISTRATIVE REMEDIES AND RIPENESS

Defendants contend that the suit has been improperly brought before this court because plaintiffs have not exhausted their administrative remedies. This action, however, is a direct constitutional challenge to Title V of the act. There is no need to exhaust administrative remedies since neither administrative law judges nor review boards have jurisdiction to decide constitutional issues. *See, e.g., Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974); *Virginia Chapter Associated General Contractors* v. *Kreps*, 444 F. Supp. 1167, 1179 (W. D. Va. 1978). Therefore, this action has been properly brought under 28 U.S.C. § 1331 for this court to decide the constitutionality of the act.

Defendants also argue that the action is untimely because plaintiffs' claims are not ripe for adjudication since the permanent program phase of the act's regulatory program will not be in force until 1980.

The plaintiffs are primarily attacking the requirement that the steep slopes of Virginia be restored to their approximate original contour after being surface mined. Title V, § 515(d)(2), 30 U.S.C. § 1265 (d)(2). This provision is in full force and effect at this time. In addition, the sanctions for noncompliance with this provision are also in effect. The plaintiffs are presently aggrieved by operation of the act, and, therefore, the constitutional issues are ripe to be decided. *See Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 81-82 (1978); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947).

II.

THE COMMERCE POWER

Plaintiffs maintain that the act, "in purporting to regulate the use of private, non-federal lands within a state," exceeds the power of Congress to regulate interstate commerce. This court finds that Congress' enactment of the federal surface mining act is within the scope of the commerce clause, but is unconstitutional because it transcends the constitutional barrier imposed by the Tenth Amendment. *See* Part III *infra*.

This court must defer to the congressional finding in § 101 of the act, 30 U.S.C. § 1201(c), that surface coal mining has adverse effects on commerce.[1] When

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[1] The section reads in full: Congress finds and declares that —(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce

faced with a challenge to the commerce power of Congress to enact particular legislation, a court may neither examine the motive or purpose behind the legislation, *United States* v. *Darby*, 312 U.S. 100, 115 (1941), nor substitute its own judgment for that of the Congress. *See generally, Noble State Bank* v. *Haskell*, 219 U.S. 575, 580 (1911) (Holmes, J.).[2]

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and the public welfare by destroying or diminishing the utility of land for forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources . . . .

The evidence presented at trial indicated that surface mining may not be as detrimental to the environment as other activities. While any disturbance of land obviously pollutes streams, calculations in the seven county area of Virginia show that fifty-four percent of suspended solids in the water came from agriculture and seventeen percent from active surface mining. Furthermore, the highest level of sedimentation of streams in the eastern United States is in the Bluegrass Section of Kentucky with its horse and tobacco farms and similar areas in central Ohio and Tennessee where no mining occurs. Also, no solid evidence was presented to the court that surface mining causes flooding; various studies to date show that strip mining does not cause flooding.

[2] This principle was strongly stated in the dissent of Justice Frankfurter in *Trop* v. *Dulles*, 356 U.S. 86, 120 (1958):

> It is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is the essence of observation of the ju-

Rather, a court is limited to the determination of whether Congress had ". . . a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce. . . ." *Katzenbach* v. *McClung*, 379 U.S. 294, 303 (1964).

Of paramount importance to the present inquiry into commerce power is the congressional determination that "surface and underground coal mining operations affect interstate commerce. . . ." 30 U.S.C. § 1201(j). There is no question that coal moves in interstate commerce and that its production has a substantial effect on the national economy. Coal produced in Virginia is shipped to other states in the nation. It is one of our nation's most abundant natural resources representing over ninety percent of our total hydrocarbon energy reserves. *See* H.R. Rep. No. 218, 95th Cong. 1st Sess., 71-76 (1977). The Surface Mining Control and Reclamation Act of 1977 is an attempt by Congress to insure that surface mining of this valuable commodity is accomplished with regard to its impact on interstate commerce and the public welfare. Congressional recognition of the enormous and multi-faceted implications for commerce of improper reclamation is embedded in Title 1, § 101, 30 U.S.C. § 1201, and pervades the act's legislative history.[3] Congress considered improper surface min-

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dicial oath, for the Constitution has not authorized the judges to sit in judgment of the wisdom of what Congress and the Executive Branches do.

[3] The act's legislative history is summarized in *Symposium, The National Coal Issue*, 81 W. Va. L. Rev. 553, 775 (1979).

ing and reclamation a threat to the productivity of the mined land in terms of its ability to support other important forms of commerce. H.R. Rep. No. 218, 95th Cong., 1st Sess. 73-76, 105-06, 116-20 (1977). Surface mining of coal in the United States may involve the temporary or permanent degradation of vast tracts of lands, a problem greatly magnified by developing mining technologies. If the land is not reclaimed in a manner that subjects it to further use, then the productivity of that land is lost to present as well as future generations, reducing the flow of other valuable items in interstate commerce. More important than the adverse economic effects on interstate commerce, however, are the *potential* costs in terms of stream pollution, floods, landslides, loss of fish and wildlife habitats, erosion of other lands, and hydrological imbalances that cumulatively have a substantial impact on interstate commerce. The courts have clearly recognized the impact of water pollution on interstate commerce. *United States* v. *Ashland Oil & Transportation Co.*, 504 F. 2d 1317, 1325 (6th Cir. 1974). *But see* note 1 *supra.*

Consequently, this court finds that Congress had a real and substantial rational basis for enacting the federal surface mining act to protect commerce and the national interest. Once a rational basis has been found, then congressional power is limited only by "express provisions in other parts of the Constitution." *North American* v. *S. E. C.*, 327 U.S. 686, 705 (1946).

III

THE TENTH AMENDMENT

Prior to *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the restraint that the Tenth Amendment placed on congressional action based upon the commerce clause was not clearly defined. The Supreme Court once described the Tenth Amendment as a "truism," placing no limitations on the commerce power. *United States* v. *Darby*, 312 U.S. 100, 124 (1941). This approach to the Tenth Amendment reached a high-water mark in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), in which the Court found that the federal wage and hour law could be applied constitutionally to nonprofessional employees of state-operated schools and hospitals. Determining there to be commerce clause power, the Court found that Congress was not constitutionally required to "yield to state sovereignty in the performance of governmental functions." *Id.* at 195. According to the Court, "it is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character." *Id.* at 195. The Court signaled a retreat from this position, however, in *Fry* v. *United States*, 421 U.S. 542, 547 n. 7 (1975), stating that "[t]he Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function

effectively in a federal system," and in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court expressly overruled *Wirtz* and swept away nearly four decades of precedent.[4]

In *National League of Cities* the Court held that the minimum wage and overtime pay provisions of the Fair Labor Standards Act could not be applied to states and subdivisions of states. The fact that wages and hours of state employees were commerce or affected commerce was not questioned. The Tenth Amendment, however, was found to preclude the exercise of commerce power "in a fashion that would injure the States' 'ability to function effectively in a federal system.' " *Id.* at 852. In reaching that conclusion, the Court carefully distinguished the authority of Congress under the commerce clause to regulate "wholly private activity," from the authority to enact regulations that were "directed, not to private citizens, but to the States as States." *Id.* at 840, 845. According to the Court, the exercise of commerce power in the former is limited only by the requirement that " 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution,' " *id.* at 840, citing *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 262 (1964), whereas its exercise in the latter is proscribed by the

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[4] *See* Beaird & Ellington, *A Commerce Power Seesaw: Balancing National League of Cities*, 11 Ga. L. Rev. 35 (1977); Michelman, *State's Rights and State's Roles: Permutations of "Sovereignty" in National League of Cities* v. *Usery*, 86 Yale L. J. 1165 (1977).

Tenth Amendment when matters "essential to [the States'] separate and independent existence" are involved.[5] *Id.* at 845. Applying the holding of *National League of Cities*, congressional action alleged to be in contravention of the Tenth Amendment must be scrutinized to determine whether the legislation is directed to the states as states and usurps an "integral governmental function."

The issue before the court, therefore, is whether the federal surface mining act is directed to the state as a sovereign entity, displacing its role as a decision-maker in areas of traditional governmental services, or whether the act is directed to private activity. While the act ultimately affects the coal mine operator, its pervasive effect is on the states' legislative authority and on state control of land within its boundaries. This point can best be illustrated by examination of the act itself. Congress finds initially that regulation of surface mining and reclamation is a primary governmental responsibility of the state, and regulations should rest with the state because of the differences in "terrain, climate, biologic, chemical and other physical conditions in areas subject to mining operations." Title I, § 101(f), 30 U.S.C. § 1201(f). Title V, however, then proceeds to establish mandatory standards that each state must adopt

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[5] Justice Blackmun's concurring opinion in *National League of Cities* indicates that Tenth Amendment restraints might not apply in environmental cases. 426 U.S. 856. This court is of the opinion that all constitutional restraints should be strictly construed except in a national emergency. None is shown to exist here.

if it desires to exercise its police powers to regulate land used for surface coal mining and to protect the personal and property rights of its citizens insofar as they may be adversely affected by surface coal mining. Title V, §§ 501-529, 30 U.S.C. §§ 1251-1279. The federal act allows the state to elect to have its own regulatory program instead of having federal regulation, but then mandates that the state law comply in complete detail with the federal law. The choice that is purportedly given is no choice at all.[6] If a state wishes to continue regulating surface mining activity, which Virginia had in the past,[7] it must conform to federal regulations.

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[6] Prior to *National League of Cities* congressional action directed to the states under the commerce power was held invalid under the Tenth Amendment if the states were "coerced" to establish a program enacted by Congress, but was valid if the states were merely "induced" to act. *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). (Cardozo, J.); *Vermont* v. *Brinegar*, 379 F. Supp. 606 (D. Vt. 1974). Thus, congressional action was invalid if Congress attempted to "commandeer the regulatory powers of the state, along with their personnel and resources, for use in administering and enforcing a federal regulatory program," and "the states [were] to function merely as departments" of the federal government. *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), *reinstated and modified sub nom. District of Columbia* v. *Costle*, 567 F.2d 1091 (D.C. Cir. 1977). The induced-coerced distinction can still be used to determine the validity of legislation affecting nontraditional governmental functions.

[7] The production of coal by surface mining in Virginia is of relatively recent origin; while some states have surface mined coal for over 100 years, Virginia did not commence surface mining until the early 1950's and no significant large produc-

The power to adopt and enforce laws affecting the use of private, nonfederal land has traditionally and historically been within the police powers of the respective states. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). The Court in *National League of Cities* does not enumerate all the activities that constitute "traditional government functions," 426 U.S. at 851 n. 16, although it does mention "fire prevention, police protection, sanitation, public health, and parks and recreation" as examples. State regulation of land use is in a different category than these activities, not being a service per se; however, the court feels that it also "provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S. at 855. A state is its citizens and protection of their land is as vital an activity as any of the other enumerated services.[8]

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tion occurred until the 1960's. The Legislature passed significant surface mining legislation in 1966. Va. Code §§ 45.1-01 to -225 (Repl. Vol. 1974). This legislation was amended and improved up until the passage of the federal act.

Prior to the commencement of the trial of this case, the Virginia Legislature passed the Virginia Coal Surface Mining Control and Reclamation Act of 1979 in order to establish the state regulatory program called for under the federal act. It corresponds with the federal act with respect to performance standards; the enforcement provisions are in substantial conformity with the federal act. Va. Code §45.1-226 to -270 (Cum. Supp. 1979).

[8] The Court comments that there is a major difference in Congress' ability to regulate "individual businesses neces-

The Court in *National League of Cities* speaks of the unconstitutional displacement of state power occurring when the state no longer has the ability to make "essential decisions." 426 U.S. at 855. Since *National League of Cities*, it has been held that the Tenth Amendment is not infringed if "the states retain broad discretion under the regulations to control the use of their land in the scope of their economic development." *Sierra Club* v. *Environmental Protection Agency*, 540 F. 2d 1114, 1140 (D.C. Cir. 1976). The evidence presented to this court clearly shows that the Commonwealth of Virginia does not retain broad discretion under the regulatory scheme devised by Congress to control economic development of the land in southwest Virginia, nor does it retain the power to make choices as to essential decisions regarding that land. The provision requiring return to "approximate original contour" for all operations, regardless of the conditions, is the most intrusive

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sarily subject to the dual sovereignty of the government of the Nation and of the state in which they reside" and congressional authority to regulate the state acting as a state. 426 U.S. at 851. Professor Tribe notes "it seems anomalous to hold that Congress retains its preemptory power to displace state regulation of private conduct but is restrained when it attempts to control decisions affecting the state's own service-providing employees." Tribe, *American Constitutional Law* 312 (1978). He then reasons, however, that the language of *National League of Cities* is "consistent with a protected state role premised on individual rights." *Id.*

practical aspect of the act.[9] Title 30 U.S.C. § 1265 (d)(2) requires that steep slopes shall be reclaimed by "[c]omplete back-filling with spoil material . . . to cover completely the highwall and return the site to the appropriate [sic] original contour. . . ." Virginia is particularly affected by this legislation because ninety-five percent of its strippable reserves are located on slopes in excess of twenty degrees and, therefore, the "approximate original contour" provisions come into play with regard to almost all of the state's coal reserves.

In enforcing this requirement, the state has lost control over the economic development that could take place in southwest Virginia. The Commonwealth is deprived of its right to dictate whether this land could be better used for some other purpose. The facts show there is a great need for level land in the seven counties that comprise the coal fields of Vir-

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[9] A variance from the original contour is allowed by § 515(e), 30 U.S.C. § 1265(e). *See* note 14 *infra*. At the time of trial and briefing, § 515(e) was considered to be part of the permanent program rather than the interim program. The Office of Surface Mining has since changed its position on this matter and has published proposed rules for interim program variances. 44 Fed. Reg. 61312-61314 (Oct. 24, 1979).

In comments to those proposed rules, the government notes that the variance is conditioned upon "complete backfilling with spoil material . . . to cover completely the highwall," 30 U.S.C. § 1265(e)(1), which requirement "will limit the usefulness of the variance in very steep slopes" and "may make the variance of little use in certain instances." 44 Fed. Reg. 61313 (Oct. 24, 1979). For all practical purposes, the backfilling stipulation destroys the usefulness of a variance since the highwall must still be covered.

ginia. Some of the uses that strip mined land has previously been put to, and which would be within the state's interest to continue, include construction of schools, airports, industries, recreation areas, and shopping centers on the leveled land. In addition to these uses, agricultural advantage was taken of strip mined land. In many instances, leveled land was sown with grain and grazed by cattle or sheep. The federal law does not provide a variance for agricultural use on steep slopes.[10]

In addition to preventing forward-looking land use planning, the reclamation provisions adversely affect land values. Before coal land in southwest Virginia is stripped, up until the trial in this suit, it was worth five dollars to seventy-five dollars an acre. After being leveled, land is worth a minimum of five thousand dollars an acre and may bring as much as three hundred thousand dollars an acre or one thousand to five thousand dollars a front foot. If land is restored to its original contour, its worth reverts to the lower values.

The facts also show that returning a steep slope area to original contour after it has been surface mined is economically infeasible and physically impossible. The cost of production of coal is increased up to seventy percent. On occasion the economic im-

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[10] *See* Proposed Rules, 44 Fed. Reg. 61313 (Oct. 24, 1979). Section 515(c)(3) does provide for an agricultural variance when the mining operation involves mountain-top removal. The evidence presented to this court indicates that this method is not available to coal mining operators in southwest Virginia. *See* note 14 *infra*.

practicality of strip mining coal is outweighed by physical realities; equipment may not be available to cover the highwall on a steep slope to restore the original contour. These effects aggregate to undermine the Commonwealth's economy: coal companies have gone out of business, between five hundred and one thousand coal miners have lost their jobs; income from surface mining permits has decreased; the coal-based revenues that the counties rely on to operate have been reduced. Most of the high schools built in recent years in these counties were financed through the coal severance tax. The production of coal is a two-billion dollar business in Virginia, contributing substantially to its economy. While the production is confined to the seven counties in Virginia's most western tip, it also affects many other counties when coal is transported to the port of Norfolk via the Norfolk and Western and Chesapeake and Ohio Railroads. These railroads employ ten thousand people in coal related activities in the Hampton Roads area alone.

Besides having been forced to spend 1.5 million dollars to meet the mandates of the federal law, the state has been deprived of its choice as to how best to protect Virginia's environment. The undisputed testimony in this case shows that the Commonwealth was completely shut out of the input process for drafting the interim regulations or the permanent program. Virginia recommended that the legislation should take into consideration the particular problems that existed in the coal industry due to terrain, as

Congress had recognized was appropriate. The state is now in the position of enforcing an act so particularly unsuited to its terrain that compliance with its provisions has a higher potential for environmental harm than alternative procedures.[11] A return to approximate original contour on a steep slope increases sedimentation because of the increased erosion from the unstable mass. In addition, a dangerous condition may be created by backfilling the bench. When overburden material is stacked up against the highwall, the normal process of settlement of the fill material tends to pull it away from the highwall. This provides a natural channel for water from the upper slope to flow down to the bench below and saturate the underlying material, creating an unstable mass with a likelihood of eventual collapse.

After having synthesized the cumulative effects of the evidence presented, the court finds that the Surface Mining Control and Reclamation Act of 1977 operates to "displace the States' freedom to structure integral operations in areas of traditional govern-

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[11] The federal government itself sponsored studies that showed this to be the case. *See* Glover, *Digesting the Strip Mining Act*, Kentucky Bench & Bar 25-29 (Jan. 1978), *citing Erosion and Sediment Control, Surface Mining in Eastern U.S.*, U.S. Environment Protection Agency: October 1976, prepared under contract by Hipman Associates, Inc., Columbia, Maryland; *Evaluation of Current Surface Coal Mining Overburden Handling Techniques and Reclamation Practices, Phase III: Eastern U.S.*, U.S. Dept. of Interior, Bureau of Mines, July 1976, prepared under contract by Mathtech, a division of Mathematica, and Ford, Bacon & Davis Utah, Inc., a subsidiary of Ford, Bacon & Davis.

mental functions," *National League of Cities*, 426 U.S. at 852, and, therefore, is in contravention of the Tenth Amendment. As in *National League of Cities*, 426 U.S. at 846-51, the plaintiffs have shown that there is a significant impact on the governmental bodies involved: through forced relinquishment of state control of land use planning; through loss of state control of its economy; and through economic harm, from the expenditure of state funds to implement the act and from destruction of the taxing power of certain counties, cities, and towns. The act has "substantially restructure[d] traditional ways in which the local governments have arranged their affairs." *National League of Cities*, 426 U.S. at 849.

In considering the relief to be granted in a case like this, the state and federal government's interests must be balanced.[12] The approximate original contour requirement imposed by the act is not environmentally sound and does not serve the conservation interests of the federal government. No harm will be visited upon the federal government nor to the environment to permanently enjoin this provision of the act. On the other side, this provision and the postmining land use restrictions drastically affect the economy of the Commonwealth of Virginia, making it economically and physically impossible to mine coal, and prevent the state from using its land for agricultural purposes, for construction of airports, schools,

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[12] Justice Blackmun suggests that this is what the majority has actually done in *National League of Cities*, 426 U.S. at 856.

hospitals, and for other activities. By recognizing these facts in granting relief, the preemptive power of the federal government through the commerce clause is recognized and the rights of the Commonwealth of Virginia as set out in the Tenth Amendment are preserved.

The other provisions of the act that infringe upon traditional governmental functions, however, such as the regulation of graveyards, control of blasting, and establishment of sediment ponds, while offensive, are not so burdensome to the state as to threaten its economy or affect its land use planning functions, and will not be enjoined.

For the reasons stated above, § 515(d) and (e) of the act, 30 U.S.C. § 1265(d), (e), is hereby enjoined.

IV. EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS GUARANTEES

It is asserted that the act violates Fifth Amendment equal protection guarantees because of its disproportionate economic effect on southwest Virginia, and that it is arbitrary and irrational in violation of substantive due process. First of all, it must be observed that almost any form of economic regulation will affect some persons or interests more harshly than others. In any event, it is incorrect to assume that southwest Virginia bears the entire burden of the act. While, for example, the steep slope provisions of the act, 30 U.S.C. § 1265(d), are undoubt-

edly burdensome to southwest Virginia interests, the act's stringent revegetation provisions also burden surface mine interests in Western arid lands. *See* 30 U.S.C. § 1265(b)(20). The fact that certain interests or persons are affected more than others does not render economic legislation unconstitutional. "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." [13] *United States* v. *Carolene Products Co.*, 304 U.S. 114, 152 (1938). *See Duke Power Co.* v. *Carolina Environmental Study Group, supra,* at 83; *New Orleans* v. *Duke's,* 427 U.S. 297, 306 (1976). On this basis, the court is unable to find that the act contravenes equal protection or substantive due process.

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[13] The Supreme Court has made clear that certain decisions are best left to the Congress:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Secretary of State v. *Bradley,* 440 U.S. 93, 97 (1979).

THE FIFTH AMENDMENT

The private plaintiffs in this case contend that § 515, 30 U.S.C. § 1265, is unconstitutional because its requirement to return steep slopes to their approximate original contour[14] prohibits them from

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[14] The reclamation provisions about which plaintiffs complain are set forth in § 515, 30 U.S.C. § 1265, the substantive heart of the act. The pertinent implementing regulations are found in 30 C.F.R. §§ 715.11-716.7. Section 515(b), U.S.C. § 1265(b), prescribes general standards applicable to all coal surface mining operations. Under those general standards operators must restore the land to a condition capable of supporting uses it could support prior to mining, *id.* § 1265(b)(2); restore the land to its approximate original contour with all highwalls eliminated, *id.* § 1265(b)(3); insure that reclamation occurs simultaneously and in an environmentally sound manner, *id.* § 1265(b)(16); be responsible for revegetation, *id.* § 1265(b)(20), abide by stringent standards for the segregation of spoil from topsoil or the best available subsoil, and the placement of excess spoil, *id.* § 1265(b)(5), (6), (7), (22); meet stringent standards for the construction and location of impoundments, *id.* § 1265(b)(8); minimize disturbances to the hydrological balance at the mine site and associated offsite areas by avoiding toxic drainage, preventing offsite flows of suspended solids, and by restoring the recharge capabilities of the mined area, *id.* § 1265(b)(10); meet certain standards for disposal of mine wastes, *id.* § 1265(b)(11), and comply with specific standards for various matters such as the establishment of access roads and the use of explosives, *id.* § 1265(b)(15), (17).

Additional performance standards are set forth for mountaintop remove and "steep slope" mining. In the case of mountaintop removal there is an important, but limited, exception for the requirement that land be returned to its approximate original contour: a variance is allowed when the operator demonstrates that a higher use is both feasible and planned. *Id.* § 1265(c). The alternative methods of surface mining that are provided in the act, mountaintop removal

mining coal on their own land, and, therefore, their properties have been taken without due process and just compensation. They also complain that § 522 of the act, 30 U.S.C. § 1272, is unconstitutional for the same reason.

This court has found; as stated in Part III of this opinion, that ninety-five percent of the strippable coal lands in Virginia are located on slopes in excess of twenty degrees, that if the land is surface mined it must be restored to its approximate original contour under § 515, 30 U.S.C. § 1265, that it is economically and physically impossible to restore these steep slopes to approximate original contour, and,

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and "block cut" method, are not feasible in the steep mountain area of Virginia because the land holding pattern consists of small parcels of usually less than one hundred acres.

For purposes of the additional standards applicable to steep slope mining, a "steep slope" is defined as "any slope above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or state." *Id.* § 1265(d)(4). When mining on such slopes, spoil or waste materials may not be placed downslope below the bench or mining cut; the operator may not disturb the land above the top or highwall unless it is found that such disturbance will facilitate compliance with the act's environmental protection standards; and complete backfilling with spoil material is required to "cover completely the highwall . . . ." *Id.* § 1265(d). A variance is allowed if the owner of the property so requests in writing, the watershed control of the area is improved, the potential use of the affected land is deemed to constitute an equal or better economic or public use, and it is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site. *Id.* § 1265(e). *But see* note 9 *supra.*

therefore, that it is physically and economically impossible to mine the coal. While current regulations provide for variances, they are meaningless due to the language of the act. *See* note 9 *supra*. Even if the coal could be removed and the land restored to approximate original contour, the court finds that its value has been diminished to practically nothing. It has nominal market value, worth from five dollars to seventy-five dollars per acre; whereas, if it were left leveled or stabilized with benches, with roads already constructed, it would be worth from five thousand dollars to three hundred thousand dollars per acre.

The other provision complained of, § 522 of the act, 30 U.S.C. § 1272, expressly prohibits mining near a road, public building, school, church, public park, community building, or cemetery, and other place the state might designate.

While a taking normally occurs as the result of formal condemnation proceedings, substantial burdensome interference by the government with a property owner's use of his property may amount to a constructive taking that must be compensated under the Fifth Amendment. This principle was first clearly enunciated in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). In that case the defendant coal company deeded away surface rights to land containing coal deposits. Several years later Pennsylvania passed a law prohibiting the mining of coal that would cause a subsidence of any structure used for human

habitation. Relying on the state act, plaintiffs, owners of the surface rights, sought to restrain the defendant's mining activities. Speaking for the Court, Mr. Justice Holmes states that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. He noted, however, that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413. That is, "some values are enjoyed under an implied limitation and must yield to the police power." *Id.* at 413. According to Justice Holmes, this rationale has limits that may be ascertained, in part, by considering "the extent of the diminution." *Id.* at 413. Once the diminution "reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation . . . ." *Id.* at 413. Under the facts at hand, it was concluded that a compensable taking had occurred:

> "For practical purposes, the right to coal consists in the right to mine it." [Citation omitted.] What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

Id. at 414-15.

In the next major case to challenge a regulation as a taking, the Court shifted its emphasis from the magnitude of the diminution to the public purpose being served, and balanced the interests. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962). In *Goldblatt* the owner of a sand and gravel concern was forced to discontinue operation due to an ordinance banning excavation below the water table. The Court announced that the regulation was to be judged in terms of its reasonableness and that evaluation of its reasonableness depended upon ". . . such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance." *Id.* at 595. Finding no evidence that "even remotely suggest[ed] that [the] prohibition of further mining [would] reduce the value of the lot in question," the ordinance was upheld. 369 U.S. at 594.

In *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978), the Court again addressed the question of when a taking occurs, observing that it quite simply, "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injury caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." This recent decision involved a New York City law that provided no exterior changes could be made on a landmark without the advance approval of the New York City Landmarks Preserva-

tion Commission. Property owned by plaintiff, the Grand Central Terminal, was designated a landmark by the Commission in 1967. Plaintiff did not challenge the designation but sought permission in 1968 to construct a fifty-five story office building atop the terminal. Being denied permission, plaintiff brought an action maintaining that his property had been taken in violation of the Fifth Amendment. The Court held that the law constituted a legitimate exercise of the police power and that a property owner whose land is designated a landmark is not entitled to compensation, even though he may suffer substantial losses as a consequence, if he can still obtain a "reasonable return" on his property. In reaching that result, the Court found that the designation of Grand Central Station as a landmark did not interfere with the present use of the terminal; that future uses of the air space were not prohibited, and, most importantly, that New York City provided a means for compensation through its transferable rights program.

The latest Supreme Court pronouncements on taking by regulation emphasize the need for the "exercise of judgment," *Andrus* v. *Allard*, 48 U.S.L.W. 4013, 4017 (Nov. 27, 1979), and for "ad hoc, factual inquiries," *Kaiser Aetna* v. *United States*, 48 U.S. L.W. 4045, 4048 (Dec. 4, 1979). The Court in *Kaiser Aetna* pinpoints several factors that have particular significance in the taking analysis: "the economic impact of the regulation, its interference with reasonable investment backed expectations and the character of the governmental action." *Id.* That

case arose from governmental action declaring that the owners and lessees of a private pond must allow public access to the pond after they had had a channel dredged from it to the bay. The government argued that the pond had become a navigable water, and therefore, the government had regulatory power over it under the commerce clause. The Court, while noting that Congress could assure public access to the pond if it chose to do so under the broad powers granted by the commerce clause, makes clear that the taking issue is an entirely separate question from the ability to enact a statute or regulation. The Court then held that the government's action will result in a taking, being an "actual physical invasion of the privately owned marina," rather than amounting to only an "insubstantial devaluation of . . . private property." The Court was led to this conclusion by the fact that the dredging of the channel had been done with the consent of the government. The Court reasoned that this led to the parties' expectation that the property would remain private and that the government would have to exercise its power of eminent domain if they desired to take over the property.

The other case mentioned above, *Andrus* v. *Allard*, was before the Court to determine, among other issues, whether regulations enacted by the Secretary of the Interior under the Eagle Protection Act and the Migratory Bird Treaty Act effectuated a taking without just compensation in violation of the Fifth Amendment. The district court had previously held that the regulations did cause a violation of the

property owner's Fifth Amendment rights because the owners were deprived of the opportunity to earn a profit. The Supreme Court reversed the lower court, holding that the simple prohibition of the sale of property without any physical property restrictions does not constitute a taking in violation of the Constitution. The Court emphasized that the property owners had not lost the ability to derive any economic benefit from the artifacts, only the most profitable use; the "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a taking claim." 48 U.S.L.W. at 4017.

Neither *Penn Central*, *Kaiser Aetna*, nor *Allard* overrules *Pennsylvania Coal Co.* v. *Mahon*, *supra*. The Court, however, has shifted its emphasis from describing *Pennsylvania Coal Co.* as a matter of commercial impracticality with "nearly the same effect as the complete destruction" of the leased property rights, *Penn Central*, 438 U.S. at 127, to describing it as "the loss of profit opportunity . . . accompanied by a physical restriction against the removal of coal." *Allard*, 48 U. S. L. W. 4017 n. 22. While the Court has said "a reduction in value of property is not necessarily equated with a taking," *Allard*, 48 U. S. L. W. at 4017, *citing Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962), *and Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), Justice Holmes in writing the Court's opinion in *Pennsylvania Coal Co.* v. *Mahon*, *supra*, made no such contention. Speaking for the Court, he indicated that the extent of the diminution

is one factor for consideration, and the magnitude of the diminution is the dominant factor in most cases. *Pennsylvania Coal Co.* is still good law today; an examination of the cases that have been decided since and before then reveals that the extent of the diminution has always been a decisive factor in whether a taking has occurred, if not the most decisive factor.

In *Hadacheck* v. *Los Angeles*, 239 U.S. 394 (1915), an ordinance prohibiting the manufacture of bricks was held not to be a taking under the Fifth Amendment because there was "no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks." 269 U.S. at 412. The Court reserved opinion as to its decision if the clay could not be removed. *United States* v. *Cress*, 243 U.S. 316 (1917) involved government action rather than regulation. The federal government, by lock and dam, raised the water of a stream above its natural level so that lands on a nonnavigable tributary periodically overflowed, injuring but not destroying the value of privately owned land. The Court held

> [t]here is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land.

243 U.S. at 328. Thus, even if only one-half of the value of the land is impaired, it is a taking under the Fifth Amendment, "so long as the damage is substantial." *Id.* at 328. The Court therein emphasized the character of the invasion, not the amount of damages resulting from it. Likewise, in *United States* v. *Causby*, 328 U.S. 256 (1946), the Court states that the question of whether a taking has occurred is the determination that the damages are "substantial" rather than "consequential". 328 U.S. at 266. Excessive noise of military aircraft flying over claimants' property, destroying the use of the property as a chicken farm, was held to be a taking of private property for public use.

In analyzing the cases discussed in detail above, the same conclusion can be drawn as to the importance of the diminution factor. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962), never reached the question of "[h]ow far regulation may go before it becomes a taking . . . ., for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." 369 U.S. at 594. In *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), the Court, in finding that a Fifth Amendment taking had not occurred, considered the "magnitude" of the "interference" and the "severity of the impact." It ultimately came to the conclusion that the intereference with plaintiff's property was not of such

magnitude as to constitute a taking.[15] In *Andrus* v. *Allard*, 48 U.S.L.W. 4013, 4017 (Nov. 27, 1979), the Court considered the extent of the diminution that had resulted from legislation that prohibited the sale of Indian artifacts containing feathers of birds legally killed. It found that a prediction of profitability is a matter of speculation, and further, that there was no proof that an economic benefit was not available to the owners by exhibiting the artifacts rather than selling them. Loss of one strand of the bundle of property rights does not constitute a taking. Again, in *Kaiser Aetna*, 48 U.S.L.W. 4045 (Dec. 4, 1979), the Court found that the government regulation did not cause "an insubstantial devaluation of petitioner's private property," rather it resulted in "an actual physical invasion of the privately owned marina."

There are those in every generation who believe that private property should be taken without compensation whenever it is for the public good as conceived by them. This generation is no exception and

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[15] It is interesting to note that the Court in its opinions in *Goldblatt* and *Penn Central* misinterpret the holding in *Hadacheck*. In *Goldblatt*, 369 U.S. at 594, the Court says that *Hadacheck* upheld a diminution of $800,000 to $60,000 and in *Penn Central*, 438 U.S. at 131, *Hadacheck* is described as a case in which an "87½% diminution in value" did not, standing alone, constitute a taking. The Court in *Hadacheck* never actually held that there had been a diminution in the value of the property. The plaintiff had simply alleged such a loss. The holding was that the ordinance did not prohibit the removal of clay, only its manufacture into bricks. 230 U.S. at 412. The Court reserved opinion on other questions that might have arisen if the ordinance had been broader. *Id.*

exponents of this belief fill the halls of Congress and the bureaucracy and infiltrate the courts. The right of a person to own land and the protection of that right were sacred tenets of the common law; and it is no less sacred today as the population booms. We are aware that God only created so much land; that each parcel is considered unique; therefore, as the desire for land increases and the parcels of ownership become smaller and smaller the importance of the Fifth Amendment increases rather than diminishes. Today the words of Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon* are even more meaningful than when written almost sixty years ago. They deserve to be chiseled in stone and read by each generation:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

260 U.S. at 415.

Unfortunately, Justice Holmes was wrong because more and more the Fifth Amendment ban on taking any private property without compensation is ignored by men in accordance with their philosophies or whims. In 1979, a unanimous Supreme Court said

that "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for application of logic." *Allard*, 48 U.S.L.W. at 4017.

This same Supreme Court, however, in the same case, cites *Pennsylvania Coal Co.* v. *Mahon* with approval five times. Therefore, while it is free to "exercise its judgment", this court feels bound by precedent. In the case now before this court the facts are on all fours with *Pennsylvania Coal Co.* v. *Mahon.* This is not a type of case involving "an average reciprocity of advantage," 260 U.S. at 415, which has been recognized as a justification for zoning and other laws. This is a case in which the Surface Mining Act must be viewed in a practical sense, for it involves more than just a large diminution of land value, more than commercial impracticality. In Virginia the evidence shows that surface landowners are possessed of small tracts usually less than one hundred acres. The requirement of return to approximate original contour amounts to a physical restriction on the removal of coal. The landowner cannot remove his coal because it is economically and physically impossible to comply with the steep slope reclamation provisions of the act.[16] Because of the nature of the land, the owner is

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[16] This conclusion is aided by the nature of the government regulations. It has been shown by the government's own studies, *see* note 11 supra, that a return to approxi-

thereby deprived of any use of his land, not only the most profitable use. Mountainous terrain is unusable for all income producing activities unless it is level, which the act is aimed at preventing. Therefore, § 515(d) and (e), 30 U.S.C. § 1265(d), (e), and any other provision of § 515, 30 U.S.C. § 1265, or any other provision of the act that requires a surface mine operator of steep slopes to restore the land to approximate original contour, is declared to be a taking of said land under the Fifth Amendment and is hereby adjudged to be unconstitutional.

In addition, some portions of the act clearly prevent a person from mining his own land or having it mined. See, for instance, § 522 of the act, 30 U.S.C. § 1272, which expressly prohibits mining within one hundred feet of the outside right of way of any public road, within three hundred feet of any occupied dwelling or any public building, school, church, community

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mate original contour on steep slopes is environmentally unsound and may create dangerous conditions. The fact that property owners are being deprived of the use of their land by a statute that does not accomplish its purpose, nay, may even run contrary to it, tips the balance toward finding a taking. Similarly, the destruction of the owners' expectations that they would be able to mine the land they had acquired for the extraction of coal would not, in and of itself, rise to the level of compensable taking. *See, e.g., Goldblatt* v. *Hempstead, supra; Hadacheck* v. *Sebastian, supra.* This case can be distinguished from those cases, in which the Supreme Court prohibited the continuation of businesses that had been in operation for some time in order to comply with ordinances enacted for the public good. Although Congress enacted the surface mining act for the public good, its operation in Virginia does not accomplish that purpose in some instances.

or instutional building, or public park, or within one hundred feet of a cemetery, and requires the states to designate land areas unsuitable for mining. This statute is clearly a physical restriction against the removal of coal, and furthermore, requires a total loss of profit opportunity; and therefore, § 522 of the act, 30 U.S.C. § 1272, is hereby adjudged to be unconstitutional until such time as the government sees fit to obtain said land by eminent domain and payment of just compensation. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1923); *Andrus* v. *Allard*, 48 U.S.L.W. 4013 (Nov. 27, 1979).

Although Congress may have the power to prohibit surface mining, it may not do so, after plaintiffs and others have acquired land to mine coal, without invoking its eminent domain power and paying just compensation. *See Kaiser Aetna* v. *United States*, 48 U.S.L.W. 4045, 4048 (Dec. 4, 1979). In fashioning appropriate relief, the court can enter a declaratory judgment, *Duke Power Co.* v. *Carolina Environmental Transportation Co.*, 438 U.S. 59 (1978). Therefore, a declaratory judgment will be entered in accordance with the opinions expressed herein.

VI

PROCEDURAL DUE PROCESS

Plaintiffs contend that the authority given to the Office of Surface Mining inspectors to issue cessation orders [17] without a prior hearing or showing of proper

[17] The enforcement provision of the act, 30 U.S.C. § 1271, provides that the Secretary shall notify the state regulatory authority, if one exists, of the alleged violation. If there

cause is an arbitrary abuse of power and, therefore, a denial of due process of law under the Fifth Amendment of the United States Constitution. Plaintiffs further contend the issuance of violation notices and assessments of civil penalties have the same practical effect as cessation orders and also amount to a violation of procedural due process.[18]

The facts presented to this court concerning the design and enforcement of cessation orders and violation notices indicate that plaintiffs' due process claims are well substantiated. Coal mine operators

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is no such state authority or if the state fails to take action within ten days of notification of the violation, then the Secretary orders federal inspection. The ten-day notification period is waived if there is adequate proof that "imminent danger of significant environmental harm exists" and the state has failed to take "appropriate action." 30 U.S.C. § 1271(a)(1).

Although the federal act contemplates that the state will become the primary regulatory agent, the federal government continues to monitor the state. This has resulted in a duplication of effort; the federal and state inspectors work side by side enforcing the same law. As indicated above, if the state does not enforce the regulations to the satisfaction of the Secretary, then the federal government can step in at any time and enforce the regulations.

[18] The issue has been raised whether warrants are required in all instances before surface coal mining operations are inspected. The court will not rule on this issue; however, the court does find that the surface coal: mining industry is not a pervasively regulated industry because the present act is the first attempt by Congress to regulate the surface mining industry. This court is not in agreement with the findings to the contrary by the District Court of the District of Columbia in *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1318-19 (D.D.C. 1978).

are subject to cessation orders being issued for conditions that are later determined not to be in violation of the act. Irreparable harm frequently results to the operators from the unnecessary cessation of coal productions. This unfortunate situation is caused in part by the flexibility given in the act and regulations to mine inspectors to issue cessation orders and in part by the lack of an opportunity for the mine operator to be heard on the alleged violation in advance of the cessation order because of the economic injury that may result in continuing operation while being penalized for an alleged violation involving that operation.

The authority to issue cessation orders is granted by § 521(a)(2) and (3), 30 U.S.C. § 1271(a)(2), (3). The standard for issuance under § 521(a)(2) is the determination by an Office of Surface Mining [OSM] inspector that there is "imminent danger to the health or safety of the public" or "significant, imminent environmental harm to land, air, or water resources." Total or partial cessation of mining operations may be ordered. In addition, § 521(a)(3) provides that a cessation order can be issued if an operator has not abated a violation within the period allowed. The inspector must make a written finding of the failure to abate and the cessation order must be for "good cause shown." 30 U.S.C. § 1271(a)(3).

Once a cessation order has been issued, the mine operator has administrative remedies he can pursue under the act to test the validity and necessity of the order. The formal review procedure calls for the operator's application to the Secretary within thirty

days of receipt for review of the cessation order or violation notice. § 525(a), 30 U.S.C. § 1275(a). The Secretary then has thirty days in which to conduct a hearing and issue a written decision. The hearing is subject to the provisions of 5 U.S.C. § 554 and is conducted by an administrative law judge under the current regulations. The maximum sixty-day period for full adjudication has been held by one court not to be unreasonable. *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1322 n. 25 (1978) [hereinafter cited as *In re Surface Mining*]. Judicial review of the decision in federal district court is provided by § 526(a)(2), (b), 30 U.S.C. § 1276(a)(2), (b), within thirty days. De novo review by a court or jury is not permitted, nor can the court weigh the evidence. The findings of the Secretary "if supported by substantial evidence on the record considered as a whole," are conclusive. § 526(b), 30 U.S.C. § 1276(b).

An informal review of cessation orders is necessitated under § 521(a)(5), which provides that a cessation order expires after thirty days if a public hearing has not been held at or near the minesite. The statute does not require the hearing to be held under 5 U.S.C. § 554, and the Secretary's interpretation of the provision as requiring only an informal hearing has been upheld as "not arbitrary, capricious, or inconsistent with law." *In re Surface Mining*, 456 F. Supp. at 1323. The regulations currently require that the OSM issue a written decision within fifteen days of the hearing. 30 C.F.R. § 722.15 (1978).

Temporary relief from a cessation order or violation notice may be petitioned for from the Secretary before the formal review of § 525 is completed. § 525(c), 30 U.S.C. § 1275(c). The Secretary must render a decision granting or denying the relief within five days in the case of a cessation order and "expeditiously" in the case of a violation notice. In order for relief to be granted, a hearing must be held, but if relief is denied then a hearing is not required. Judicial review of this decision regarding any cessation order issued under § 521(a)(2) or (3), 30 U.S.C. § 1271(a)(2), (3), is provided by § 526(c), 30 U.S.C. § 1276(c). The court may grant such temporary relief as it deems appropriate.

The United States District Court for the District of Columbia has previously held that the act's design for issuance of cessation orders and post-cessation hearings, discussed above, was well drawn and in compliance with the due process clause of the Fifth Amendment to the United States Constitution. *In re Surface Mining*, 456 F. Supp. 1301. The federal defendants have argued that the Commonwealth of Virginia and the Virginia Surface Mining and Reclamation Association are barred from relitigating the same issues as decided in that case because they were parties to the prior suit. The two plaintiffs are not barred from participating in this suit, however, for a number of reasons. The issues in dispute are not the same: plaintiffs in the District of Columbia suit were primarily attacking the constitutionality of certain regulations issued by the Secretary; the court ruled

on the due process question as it related to the way the act was designed. In the court's opinion the standards drawn by Congress for issuance of cessation orders were "sufficiently specific to strictly control governmental action in order to reduce the risk of an erroneous deprivation." 456 F. Supp. at 1321. The question before this court is whether, in the application of the act, the plaintiffs' due process guarantees have been violated. The District of Columbia court indicated at one point that it would be inappropriate for it to rule on the constitutionality of certain regulations until they had been applied. 456 F. Supp. at 1313. In addition, the court did not rule on some parts of the act at all, for example, the question of due process guarantees for the imposition of civil penalties. In considering whether § 521(a)(3) was unconstitutional, the court mistakenly assumed that the section only provided for the issuance of violation notices and not for cessation orders. 456 U.S. at 1319 n. 18. This court also cannot bar plaintiffs from litigating the claims brought up in this suit because it is unclear from the *In re Surface Mining* opinion whether these are the same claims as were disputed therein. Because the court's decision upholds the constitutionality of cessation orders and their review procedures, however, it is necessary that this court analyze what the District of Columbia court actually held, factors that have arisen since then that affect the determination, and points on which this court is in disagreement.

The District of Columbia court was led to the conclusion that the Fifth Amendment was not violated by the following logic: (1) summary administrative action prior to a hearing has been upheld by the Supreme Court in those situations in which it is necessary to protect an important governmental interest, and the governmental interest in this case is similar to those interests that have been held to warrant deprivations prior to a hearing; (2) the use of cessation orders is limited to circumstances in which there is a need for prompt action; and (3) the act provides adequate opportunity for a mine operator subject to a cessation order to be heard. This court must respectfully disagree with some of these conclusions made by our brother in the District of Columbia for the following reasons:

The court in *In re Surface Mining* cites a string of cases in support of the proposition that summary administrative action has been upheld to protect a significant governmental interest. 456 F. Supp. at 1319, *citing Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (seizure of rental yacht carrying marijuana); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); *Bowles* v. *Willingham*, 321 U.S. 503 (1944) (rent control orders); *Phillips* v. *Commissioner of Internal Revenue*, 283 U.S. 589 (1931) (collection of federal revenue); *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554 (1921) (seizure of enemy property); *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (seizure of con-

taminated food). In citing those cases, the court does not point out the difference in the nature of the injury that could result to the affected party from operation of the summary action. While the governmental interest may be very high in protecting the environment and the public, most situations do not demand the immediate cessation of mining in order to achieve this goal.[19] There is a great deal of difference in shutting down a business from seizing a yacht, vitamin products, contaminated food, and the like. These are not situations in which entire businesses will be forced to discontinue operations. If a coal mine is shut down by a cessation order, the coal miners will be unemployed. Furthermore, the coal mine employing as few as five people will be using equipment worth at least half a million dollars in order to carry on a strip mine operation. Most of these mine operators operate on a credit basis and have to make monthly payments on heavy equipment. If a mine is closed down, the equipment may be subject to repossession for failure to meet the monthly payment. A cessation order may result in the operator going out of business even if found innocent, because the

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[19] Evidence was heard by this court of one case in which serious environmental harm was involved. Impoundment at a deep mine operation had created black water in the Powell River, causing the death of a great many fish. Even though federal and state inspectors were aware of the situation and the damage it had already caused, no cessation order was entered. The primary concern was to get the matter corrected. It was inferred from the government's questioning of witnesses that the reason a cessation order was not entered was because it would have thrown 500-1000 people out of work.

weather could have rendered the mine inoperable. This has already happened in one instance.

The District of Columbia District Court's belief that the standards drawn by the act and regulations were "sufficiently specific to strictly control government action in order to reduce the risk of an erroneous deprivation", 456 F. Supp. at 1321, has been shown to be unfounded as the act has been applied. The evidence shows that in enforcing the law, OSM inspectors have issued unjustified and arbitrary cessation orders causing irreparable harm to the mining companies. As one example, three cessation orders were issued to Paramount Mining Corporation for "significant imminent environmental harm." All three orders were substantially vacated after formal hearings on grounds that they were improperly issued. Paramount Mining Corporation requested a speedy hearing and in this case, the hearings were held within twelve days of date of issuance which resulted in the administrative law judge dismissing the cessation order. In the meantime, while Paramount Mining Corporation was shut down, a heavy rainfall filled the pits with thirty feet of water, resulting in a loss of five thousand tons of recoverable coal with a value of one hundred sixty thousand dollars ($160,000). Furthermore, the company spent fifteen thousand dollars ($15,000) in engineering and attorneys' fees in appealing the cessation orders. In another instance, on October 23, 1978, the Pittston Coal Company's Moss #3 Preparation Plant was shut down by an OSM inspector who alleged that a coal slurry im-

(1975): "First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved in the fiscal and administrative burdens that the additional or substitute requirements would entail." [23] While the private interests are pecuniary in nature, there is a substantial likelihood of irreparable harm if the implemented procedures are followed. The margin of success in a small surface coal mining operation is often narrow. The halting of such an operation for even a day may lead to its economic collapse. On the other hand, there is a strong public interest in allowing the issuance of cessation orders when there is imminent danger to the health or safety of the public or when there is threat of significant imminent environmental harm to land, air, or water resources. There is no reason, however, why a matter of this kind cannot be presented for a temporary restraining order before a

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[23] The District of Columbia court did not utilize these factors to determine whether summary administrative action was proper, but rather approached the issue from the analysis set out in *Fuentes* v. *Shevin*, 407 U.S. 67, 91 (1972), although it did cite to *Mathews* v. *Eldridge*. 456 F. Supp. at 1320. In placing undue emphasis on the *Fuentes* analysis, the court did not have the opportunity to take into account the private interest affected nor the fiscal and administrative burdens that additional due process requirements would entail, as the *Mathews* v. *Eldridge* test requires. This court believes that these facts are important considerations that must be taken into account when dealing with peoples' livelihoods.

United States District Court judge or an administrative law judge within two hours' notice. This court takes judicial notice that the Western District of Virginia, which embraces the seven coal-producing counties involved in this case, has for the past several years had the highest weighted case load per judge of any federal court in the United States, yet can hear matters within a few hours' notice. Therefore, given the substantial nature of the interests served by more expedient review, and the relatively insubstantial burdens imposed thereby, the court concludes that the requirements of due process are not fulfilled by the current standards under which summary administrative action is meted out and the administrative review procedures, as presently constituted, do not fill in the void. For the same reason, the judicial review procedures do not fill in the void to afford mining operators suffering from operation of a cessation order or heavy penalties accompanying violation notices adequate procedural due process.

Because the evidence presented to this court indicates that OSM inspectors are issuing cessation orders when they are not justified, contrary to the conclusion reached by the District of Columbia District Court of the act and regulations in their virgin state, 456 F. Supp. 1301, 1321, the court is compelled to enjoin the issuance of cessation orders without a prior hearing. The irreparable harm to the operators outweighs the government's interest in summary action. Again, the court admonishes that a party can appear before a district court judge in the Western District of Vir-

ginia on a few hours' notice to obtain temporary relief.

The summary issuance of cessation orders is enjoined until such time as Congress makes provisions to correct the use of subjective criteria by OSM inspectors. More objective guidelines are needed to protect abuses of the cessation power. Once this is accomplished, the act appears to provide adequate due process guarantees for summary administrative action, with the exception of the five-day reply provision of § 525(c), 30 U.S.C. § 1275(c), the mine operators' avenue for temporary relief. If an operator is appealing from a cessation order granted under § 521(a)(2) or (a)(3), the Secretary must respond within five days of receipt of the request. This five-day lapse may be crucial to the continuation of a coal mine, especially considering the length of time it may take to get a request to the Secretary. Once the Secretary receives the request, he should have to grant or deny it within twenty-four (24) hours, rather than five days. If he denies the request, the mine operator may then proceed directly to the United States District Court for the district in which the surface coal mining operation is located. § 526(c), 30 U.S.C. § 1276(c). The court may then grant such temporary relief as it deems appropriate provided that all parties have been given notice and opportunity to be heard; the person requesting relief has shown that there is a substantial likelihood that he will prevail on the merits; and the relief will not adversely affect the

public health or safety or cause significant imminent environmental harm to our natural resources.

The court also concludes that mine operators are not afforded sufficient due process in connection with the imposition of violation notices. The sections when read together indicate that the mine operator has to pay any imposed penalty and cumulative penalties thereof prior to adjudication of fault. *Compare* § 518, 30 U.S.C. § 1268(b), *with* § 518(c), 30 U.S.C. § 1268(b). Accordingly, the civil penalty provision of the act, § 518, 30 U.S.C. § 1268, is enjoined until such time as adequate due process guarantees are afforded operators. Summary imposition of civil penalties may be allowed, provided that the operator has an avenue for temporary relief from such imposition. Section 525(c), 30 U.S.C. § 1275(c), discussed above with reference to cessation orders, will provide this relief if, for instance, a twenty-four hour reply provision is added to the section (at the present time the Secretary must reply "expeditiously"). Section 525 is enjoined until it provides adequate due process. In addition, the coal mine operator should be able to appeal to federal court for the same judicial review as provided by § 526(c) for cessation orders. Section 526(c) does not provide for such review as it stands at present.

This court does not mean to imply that the suggested remedies are the only ones available to Congress; however, the end result in any remedial process must be that the mine operator is not penalized before a hearing, either by assessment of penalties or cessation orders.

CONCLUSION

Therefore, a declaratory judgment and injunctive relief is hereby granted to the plaintiffs in part and denied in part. An Order will issue from the court in accordance with the opinions herein expressed.

The Clerk of this court is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 3rd day of January, 1980.

/s/ Illegible
United States District Judge

A TRUE COPY, TESTE:

JOYCE F. WITT,
Clerk

By: J. Todd
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-1146

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., A & S COAL COMPANY, AMOS RIDGE COAL CO., BEVINS MINING CO., INC., BIG FORK COAL CO., BOB'S BRANCH COAL CO., BOSSCO, INC., BRADLEY BRANCH COAL CO., BRUSHY RIDGE COAL CO., BUCHANAN & SONS, BURNRITE COAL CO., CABOT COAL CORP., CARDINAL MINING LTD., CHAPARAL MINING CO., INC., CHARLES D. DALE CO., CLAUDE YEARLY COAL CO., CONLEY MULLINS COAL CO., CONWAY COAL CO., COPELAND COAL CO., CURT'S COAL CO., DEENA COAL CO., DOUBLE D COAL CO., ELKINS-KENDRICK ENTERPRISES, FIVE OAKS COAL CO., FLAT GAP MINING CO., GALE COAL CO., INC., GENOA COAL CO., G & O COAL CO., G & T COAL CO., H. B. ROWE & CO., H. C. BOSTIC COAL CO., INC., H.R.C. COAL CO., INC., HIGHLAND ENTERPRISES, HI HEAT COAL CO., HORN CONSTRUCTION CO., INC., HUMPHREYS ENTERPRISES, J. B. COAL CO., JIL-MAR COAL CO., INC., LYONS COAL CO., LAUREL CREEK COAL CO., M & M COAL CO., INC., MINERAL DEVELOPERS, INC., MULLINS COAL CO., MUD FORK COAL CO., COAL CO., BOB'S BRANCH COAL CO., BOSSCO, INC., NU-WAY COAL CO., PARAMOUNT MINING CORP., PERMAC, INC., PILOT COAL CORP., P & R COAL CO., RACE FORD COAL CORP., ROSEBUD, INC., RYDER COAL CO., S & M COAL CORP., ST. CHARLES MINING CO., STERLING MINING CO., TRACE COAL CO., TRI-

DALE COAL COMPANY, TURKEY BRANCH COAL CO., VALLEY FORK COAL CO., WISE DOCK COMPANY, W. D. MARTIN, CHARLES J. LOWRY, ROBERT W. KELLY, JR., A. F. KELLY, TOWN OF WISE, VIRGINIA; and COMMONWEALTH OF VIRGINIA, APPELLEES

-v-

CECIL D. ANDRUS, Secretary, U.S. Department of the Interior, APPELLANT

VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC., and the TOWN OF ST. CHARLES, VIRGINIA, AMICI CURIAE

Appeal from the United States District Court for the Western District of Virginia at Big Stone Gap. Glen Williams, District Judge.

Argued: July 20, 1979 Decided: August 10, 1979.

Before BUTZNER, HALL, and PHILLIPS, Circuit Judges.

Michael A. McCord, Department of Justice, William Eichbaum, Associate Solicitor; Marc McGraw, Department of the Interior; James W. Moorman, Assistant Attorney General; Carl Strass, Alfred T. Ghiorzi, Carol Green, Department of Justice on brief) for Appellant; John L. Kilcullen (Kilcullen, Smith & Heenan on brief) for Appellees Virginia Surface Min-

ing and Reclamation Association, et al.; Roger L. Chaffe, Assistant Attorney General for Appellee The Commonwealth of Virginia; (Stephen C. Greenberg, Virginia Citizens for Better Reclaration, Inc.; Robert T. Copeland, Counsel for the Town of St. Charles, Virginia on brief) for Intervenors Amicus Curiae Virginia Citizens for Better Reclamation, Inc., and the Town of St. Charles, Virginia.

BUTZNER, Circuit Judge:

The Secretary of the Interior appeals an order of the district court granting Virginia Surface Mining and Reclamation Association, a number of coal companies, individual landowners, and the Town of Wise, Virginia an interlocutory injunction against enforcement of §§ 502-522 of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C. §§ 1252-1272]. The complaint against the Secretary sought declaratory and injunctive relief to prevent enforcement of the Act on grounds that it is an unconstitutional assumption of authority under the commerce clause and a violation of the fifth and tenth amendments. The district court applied the criteria set forth in Blackwelder Furniture Company v. Sealy Manufacturing Co., 550 F.2d 189 (4th Cir. 1977) for determining when a preliminary injunction should be issued. It ruled:

> [U]nless the court grants a temporary injunction now, plaintiffs will suffer irreparable injury; on the other hand, the defendant has introduced scant evidence to show that the issuance of the temporary injunction would substantially harm

> other interested parties or that the public interest would be adversely affected. Therefore under the *Blackwelder* test, it is not necessary for this court to determine whether the plaintiffs are likely to succeed on the merits of their suit.

Nevertheless, the court went on briefly to discuss the plaintiffs' constitutional challenge to the Act's reclamation requirements and its authorization for cessation orders. With respect to these provisions, the court concluded that the plaintiffs were likely to prevail on their allegation that the Act violated rights secured to them by the fifth amendment. The Court did not address the other constitutional objections alleged by the plaintiffs. The court's order enjoined the Secretary:

> from taking any action to enforce (by cessation order, permanent suspension or revocation, violation citations or notices, penalty, prosecution or otherwise) any and all provisions of §§ 502 through 522 [of the Act].

We believe that the district court applied an improper standard for granting relief and that it erred by failing to give any consideration to the congressional findings set forth in § 101 of the Act [30 U.S.C. § 1201]. Accordingly, we reverse the judgment and dissolve the interlocutory injunction.

The Surface Mining Act is a comprehensive statute designed, through interim and permanent measures, to establish nationwide, uniform regulations for surface coal mining operations in cooperation with the states. The Secretary of the Interior, acting through

terests affected by the Act. While these declarations do not conclusively establish the Act's constitutionality, a court considering the propriety of an injunction prohibiting enforcement of the Act must give them due consideration in determining whether the public interest will be adversely affected by its interlocutory order.

The judgment of the district court is reversed, and the injunction it entered February 14, 1979 is dissolved. The Clerk is directed to issue the mandate forthwith.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

[Filed Feb. 14, 1979]

Civil Action No. 78-0244-B

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL, PLAINTIFFS

and

TOWN OF WISE, VIRGINIA, INTERVENOR-PLAINTIFF

v.

CECIL D. ANDRUS, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, DEFENDANT

MEMORANDUM OPINION AND ORDER

A complaint to enjoin enforcement of the Surface Mining Control and Reclamation Act of 1977, Title 30 U.S.C. § 1201 *et seq.*, was filed on the 23rd day of October, 1978, by the Virginia Surface Mining and Reclamation Association, Inc., a voluntary, non-profit association of small coal producers, the principal purpose of which is to represent the interests of the coal mining industry in Virginia and to assist the public authorities in dealing with problems that affect the industry; by sixty-three (63) coal companies which are members of the association and are engaged or

have been engaged in surface coal mining operations in the Western District of Virginia; and by four (4) landowners, who are the owners of coal lands and mineral estate interests in coal lands on which surface coal mining operations are being conducted, or which are suitable for surface coal mining operations. Defendant Cecil D. Andrus, Secretary of the Interior, is charged with the responsibility for administering and enforcing the provisions of the Surface Mining Control and Reclamation Act of 1977, which was enacted into law by the United States Congress on August 3, 1977.

This court has jurisdiction of this action under Title 28 U.S.C. §§ 1331 and 2201.

Briefly summarized, the compaint alleges that the Surface Mining Control and Reclamation Act of 1977 is unconstitutional because the Act infringes upon power reserved to the States by the Tenth Amendment to the United States Constitution; that the reclamation requirements of the Act violate the Fifth Amendment to the United States Constitution, prohibiting the taking of private property without just compensation; that the power granted under the Act to the defendant to issue cessation orders without a hearing violates the due process clause of the Fifth Amendment to the United States Constitution; and that the Act violates the equal protection guarantee of the Fifth Amendment to the United States Constitution. Plaintiffs further allege that if the Act is enforced, they and other citizens of the Commonwealth of Virginia will suffer irreparable injuries in

violation of their rights guaranteed and protected by the Constitution of the United States, and for which injuries they have no adequate remedy at law. The plaintiffs petition the court to declare the Surface Mining Control and Reclamation Act of 1977 unconstitutional for the reasons above stated, and they seek a preliminary and a permanent injunction enjoining and restraining the Secretary of the Interior and his agents, employees and representatives from enforcing against the plaintiffs the unlawful and unconstitutional provisions of the Act.

On the 4th day of December, 1978, this court entered an Order granting the Town of Wise, Virginia, leave to intervene in this proceeding as a party plaintiff. The Town of Wise has filed a complaint alleging that it is irreparably harmed by the provisions of the Surface Mining Control and Reclamation Act of 1977 in that its tax revenue will be reduced because of the effects of the Act on employment in the area. The Town of Wise seeks the same relief as that sought by the original plaintiffs in this suit.

On the 10th day of January, 1979, plaintiffs filed a motion for a temporary injunction supported by affidavits and accompanied by a memorandum of law in support of the motion.

On the 22nd day of January, 1979, defendant Cecil D. Andrus filed a motion to dismiss the complaint accompanied by a memorandum in support of the motion.

On the 23rd day of January, 1979, this court entered an Order setting a hearing on the motion for a preliminary injunction for the 13th day of February, 1979, and further directed the defendant to submit any counter-affidavits in opposition to the motion for a temporary injunction on or before the 9th day of February, 1979. By Order dated February 2, 1979, this court also set arguments on the motion to dismiss filed by the defendant for the 13th day of February, 1979.

On the 6th day of February, 1979, this court granted the motion of Virginia Citizens for Better Reclamation, Inc., for leave to intervene as amicus curiae in support of the defendant and the court directed that their brief and supporting affidavits should be submitted no later than February 9, 1979.

On the 9th day of February, 1979, the plaintiffs filed additional affidavits in support of their motion for preliminary injunction and a brief in opposition to the motion to dismiss. Also, Virginia Citizens for Better Reclamation, Inc. filed affidavits and brief in opposition to the motion for temporary injunction. On the 12th day of February, the defendant filed a brief in opposition to the motion for preliminary injunction and an affidavit of Charles A. Beasley, Acting Regional Director, Region I, Office of Surface Mining and Enforcement, Department of the Interior.

On the 13th day of February, 1979, the Court heard direct testimony from David W. Harris, B. V. Cooper, Phillip Trent, Dennis Willis, James McClel-

lan, Curtis Bowers and Michael Quillen on behalf of the plaintiffs and Douglas Stone on behalf of the defendant.

FINDINGS OF FACT

For purposes of considering both the motion to dismiss filed by the defendant and the motion for a temporary injunction filed by the plaintiffs, this court must accept certain facts as undisputed inasmuch as these facts are supported by affidavits and accompanying documents and have not been contradicted by any counter-affidavits or other evidence.

The Surface Mining Control and Reclamation Act imposes stringent performance standards upon coal mining operations on slopes greater than 20°. Indeed, it is stated in the defendant's brief that one of the purposes of the Act is to prevent surface mining operations from being conducted where reclamation is not feasible. The primary thrust of the affidavits filed on behalf of the plaintiffs is that the Act makes surface mining economically prohibitive on slopes of 20° or greater. An examination of the Act confirms this contention.

The undisputed facts in this case show that the Act has its greatest impact on the land area located in the Western District of Virginia, since 95% of the coal reserves found in Virginia and capable of being strip mined are located on slopes with an incline greater than 20°. In fact, the Act is intended to focus on central Appalachia, consisting of the eastern part of Kentucky and parts of West Virginia and Vir-

ginia. The Act has only minimal impact on the entire western coal producing area of the United States, since no surface coal reserves are located on steep slopes in the mid-western states, and in all of the western states where there are large coal reserves, the only state adversely affected by the Act is Colorado, which has 10% of its coal reserves located on steep slopes. Even in the eastern United States, only 6% of Pennsylvania's reserves is found on steep slopes and only 9% of the coal found in Alabama is on steep slopes.

Some of the coal companies which are plaintiffs in this suit are located in Buchanan County, Virginia, in which county coal mining earnings represent 63.7% of the total income of the entire county. The evidence shows that the Act establishes performance standards which are designed to restrict or prevent the recovery of coal from 95% of the coal reserves in the Western District of Virginia, as contrasted with other states which are either totally unaffected or are minimally affected by the steep slope restrictions.

According to the evidence of Dennis v. Willis, a professional engineer registered in the states of Virginia, Kentucky, Tennessee and West Virginia, if it is assumed that an operator could in some way obtain a permit for surface mining, and considering that the average slope in Virginia is 26°, the increase in mining costs imposed by the Act could increase the cost of coal production in Virginia by as much as

73%. Since the cost of mining coal in most of the other coal producing states would not be increased at all, a mining operation in Virginia probably could not exist and compete due to the increased costs imposed by this Act. Therefore, assuming that the Act does permit mining on slopes in excess of 20°, the increased costs make it commercially impracticable to do so, and for this reason alone as much as 95% of the coal in Virginia could not be mined through surface mining.

Furthermore, the Act requires land that has been mined by surface mining to be restored to its original contour (with some possible exceptions) despite the fact that in many cases the land is more useful as flat land. The evidence of George E. Honeycutt shows examples of the use of land which has been surface mined and not restored to its original contour: at this time the Wise County, Virginia, Fairgrounds are located on a reclaimed surface mine; the airport at Wise, Virginia, is located on reclaimed surface mine land which was not restored to its original contour; also the Norton, Virginia, Community Hospital, the Norton Elementary School, a low-income housing development and a large shopping center are similarly located. The undisputed evidence also shows that in many of the counties in western Virginia, flat land is practically non-existent and needed for commercial, residential and public uses.

The evidence discloses that since the passage of the Surface Mining Control and Reclamation Act of

1977, twenty six (26) Virginia coal producing companies have gone out of business, due partly to the restrictions imposed by the Act.

The court also finds from the evidence that, since the Federal Act become effective, in excess of five hundred (500) coal miners have become unemployed in Southwest Virginia. Some of this unemployment is directly related to the Act, and many of these miners are now drawing unemployment benefits. The number of surface mining permits has plummeted, and thirty five (35) cessation orders have been issued by Federal inspectors, and, as a direct result, some coal companies were put out of business, even though later hearings exonerated the companies from any violation of the Act.

While the defendant contends that the public will be irreparably harmed if an injunction is issued in this case because of blasting, flooding and pollution, the weight of the evidence shows that with regard to blasting, those suffering property damage have an adequate remedy at law. As to flooding and pollution, the plaintiffs presented to the court documentary and expert testimony which, to say the least, renders it doubtful or inconclusive, that strip mining causes flooding or pollution.

CONCLUSIONS OF LAW

In determining the standards to be applied in ruling on the defendant's motion to dismiss and the plaintiffs' motion for a temporary injunction, the

seizing a rental yacht carrying marijuana, or seizing a mislabeled vitamin product, or appointing a conservator for a savings and loan association, or imposing rent control orders, or collecting federal revenue, or seizing enemy property. Such governmental actions are obviously distinguishable. For example, the collection of federal revenue in advance without a hearing only requires the taking of money, which the Government holds, and if the Government has improperly received it, it can be returned with interest. There is no irreparable damage in such a case to the party from whom the money is seized. The same reasoning applies to the seizure of a rental yacht, for if the person is operating a legitimate business, he can always rent a replacement yacht, and the seized yacht is not destroyed during the time it is held.

In the instant case, the court is concerned with cessation orders, which can prohibit a person from using his own land or interest in land. The Government has failed to show this court any case in which the Federal Government, without a hearing, forced a person not to use his own land, particularly under circumstances such as mining, where the harm may very well be irreparable. This court believes that to require a person to cease mining, without proper notice or opportunity for a hearing, is a flagrant violation of the Fifth Amendment to the Constitution of the United States, which requires that a hearing be conducted prior to such a taking. This court is of the opinion that the plaintiffs have shown a strong

likelihood of prevailing on at least these two issues in this case.

Therefore, this court having fully considered the plaintiffs' motion for a preliminary injunction, together with the various affidavits submitted therewith, and the respective memoranda submitted by the plaintiffs and the defendant, and having heard oral argument thereon, it is hereby ADJUDGED AND DECREED that defendant and all persons serving as officers, employees and agents subject to his control and direction, are hereby enjoined and restrained, until such time as this court renders a final judgment or decree on the matter complained of in the complaint and embraced in such motion for a preliminary injunction, from taking any action to enforce (by cessation order, permit suspension or revocation, violation citations or notices, penalty, prosecution or otherwise) any and all provisions of sections 502 through 522 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1252-1272.

It is further ORDERED that a hearing is hereby set for the purpose of presenting such evidence as may be desired by either party and further arguments on behalf of any parties, as to whether a permanent injunction shall be granted in this case. Such hearing shall commence at 9:30 a.m. on the 26 day of March, 1979, at Big Stone Gap.

The Clerk of this court is directed to send certified copies of this Memorandum Opinion and Order to counsel of record.

ENTER: This 14th day of February, 1979.

/s/ Glen M. Williams
GLEN M. WILLIAMS
United States District Judge

A TRUE COPY, TESTE:
JOYCE F. WITT,
Clerk

By: J. Todd
J. TODD
Deputy Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Civ. No. 78-0224-B

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

and

VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC., ET AL., DEFENDANTS

[Filed Feb. 1, 1980]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Secretary of the Interior, one of the defendants in this case, appeals to the Supreme Court of the United States from the final order and judgment entered in this action January 3, 1980, and from the order of January 21, 1980, amending the prior order.

This appeal is taken pursuant to 28 U.S.C. 1252 and 2101

Respectfully submitted,

E. MONTGOMERY TUCKER
United States Attorney

MORGAN E. SCOTT, JR.
Assistant United States Attorney

/s/ Andrew F. Walch
ANDREW F. WALCH
Attorney,
Department of Justice
Land and Natural Resources
Division
Benjamin Franklin Station
P.O. Box 7415
Washington, D.C. 20044

I hereby certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid, this 30th day of January 1980, addressed to the following:

Roger L. Chaffe, Esquire
Assistant Attorney General
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

Robert T. Winston, Esquire
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/s/ Andrew F. Walch
ANDREW F. WALCH
Attorney,
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Land and Natural Resources Division
Benjamin Franklin Station
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APPENDIX H

SUPREME COURT OF THE UNITED STATES

Nos. A-720 and A-725

CECIL D. ANDRUS, SECRETARY OF INTERIOR, APPLICANT,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.; and

VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC., ET AL., APPLICANT,

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.

ON CONSIDERATION of the applications for stay of judgment of the United States District Court for the Western District of Virginia, No. 78-0224-B, entered January 3, 1980 as amended January 21, 1980.

IT IS ORDERED by this Court that the said applications be, and the same are hereby, granted pending the timely filing and disposition of the appeals in this Court.

March 17, 1980

A true copy
Test: MICHAEL RODAK, JR.
Clerk of the Supreme Court
of the United States

By: /s/ Francis J. Lorson
Deputy

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Tenth Amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 101 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201, provides:

> The Congress finds and declares that—
>
> (a) extraction of coal and other minerals from the earth can be accomplished by various methods of mining, including surface mining;
>
> (b) coal mining operations presently contribute significantly to the Nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to

the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;

(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;

(d) the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health, and safety of the public.

(e) surface mining and reclamation technology are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this Act is an appropriate and necessary means to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations;

(f) because of the diversity in terrain, climate, biologic, chemical, and other physical con-

(b) All surface coal mining operations on lands on which such operations are regulated by a State which commence operations pursuant to a permit issued on or after six months from the date of enactment of this Act shall comply, and such permits shall contain terms requiring compliance with, the provisions set out in subsection (c) of this section. Prior to final disapproval of a State program or prior to promulgation of a Federal program or a Federal lands program pursuant to this Act, a State may issue such permits.

(c) On and after nine months from the date of enactment of this Act, all surface coal mining operations on lands on which such operations are regulated by a State shall comply with the provisions of subsections 515(b)(2), 515(b)(3), 515(b)(5), 515(b)(10), 515(b)(13), 515(b)(15), 515(b)(19), and 515(d) of this Act or, where a surface coal mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining, such operation shall comply with the requirements of section 515(c) (4) and (5) without regard to the requirements of section 515(b)(3) or 515(d)(2) and (3) with respect to lands from which overburden and the coal seam being mined have not been removed: *Provided, however,* That surface coal mining operations in operation pursuant to a permit issued by a State before the date of enactment of this Act, issued to a person as defined in section 701(19) in existence prior

to May 2, 1977 and operated by a person whose total annual production of coal from surface and underground coal mining operations does not exceed one hundred thousand tons shall not be subject to the provisions of this subsection except with reference to the provision of subsection 515 (d) (1) until January 1, 1979.

(d) Not later than two months following the approval of a State program pursuant to section 503 or the implementation of a Federal program pursuant to section 504, regardless of litigation contesting that approval or implementation, all operators of surface coal mines in expectation of operating such mines after the expiration of eight months from the approval of a State program or the implementation of a Federal program, shall file an application for a permit with the regulatory authority. Such application shall cover those lands to be mined after the expiration of eight months from the approval of a State program or the implementation of a Federal program. The regulatory authority shall process such applications and grant or deny a permit within eight months after the date of approval of the State program or the implementation of the Federal program, unless specially enjoined by a court of competent jurisdiction, but in no case later than forty-two months from the date of enactment of this Act.

(e) Within six months after the date of enactment of this Act, the Secretary shall implement a Federal enforcement program which shall remain in effect in each State as surface coal mining operations are required to comply with the provisions of this Act, until the State

program has been approved pursuant to this Act or until a Federal program has been implemented pursuant to this Act. The enforcement program shall—

(1) include inspections of surface coal mine sites which may be made (but at least one inspection for every site every six months), without advance notice to the mine operator and for the purpose of ascertaining compliance with the standards of subsections (b) and (c) above. The Secretary shall order any necessary enforcement action to be implemented pursuant to the Federal enforcement provision of this title to correct violations identified at the inspections;

(2) provide that upon receipt of inspection reports indicating that any surface coal mining operation has been found in violation of subsections (b) and (c) above, during not less than two consecutive State inspections or upon receipt by the Secretary of information which would give rise to reasonable belief that such standards are being violated by any surface coal mining operation, the Secretary shall order the immediate inspection of such operation by Federal inspectors and the necessary enforcement actions, if any, to be implemented pursuant to the Federal enforcement provisions of this title. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspec-

tion is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection;

(3) provide that the State regulatory agency file with the Secretary and with a designated Federal office centrally located in the county or area in which the inspected surface coal mine is located copies of inspection reports made;

(4) provide that moneys authorized by section 712 shall be available to the Secretary prior to the approval of a State program pursuant to this Act to reimburse the State for conducting those inspections in which the standards of this Act are enforced and for the administration of this section.

(5) for purposes of this section, the term "Federal inspector" means personnel of the Office of Surface Mining Reclamation and Enforcement and such additional personnel of the United States Geological Survey, Bureau of Land Management, or of the Mining Enforcement and Safety Administration so designated by the Secretary, or such other personnel of the Forest Service, Soil Conservation Service, or the Agricultural Stabilization and Conservation Service as arranged by appropriate agreement with the Secretary on a reimbursable or other basis;

(f) Following the final disapproval of a State program, and prior to promulgation of a Federal program or a Federal lands program pursuant

to this Act, including judicial review of such a program, existing surface coal mining operations may continue surface mining operations pursuant to the provisions of section 502 of this Act. During such period no new permits shall be issued by the State whose program has been disapproved. Permits which lapse during such period may continue in full force and effect until promulgation of a Federal program or a Federal lands program.

Section 503 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1253, provides:

(a) Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 521 and 523 and title IV of this Act, shall submit to the Secretary, by the end of the eighteenth-month period beginning on the date of enactment of this Act, a State program which demonstrates that such State has the capability of carrying out the provisions of this Act and meeting its purposes through—

(1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act;

(2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which

sanctions shall meet the minimum requirements of this Act, including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the State regulatory authority or its inspectors;

(3) a State regulatory authority with sufficient administrative and technical personnel, and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this Act;

(4) a State law which provides for the effective implementations, maintenance, and enforcement of a permit system, meeting the requirements of this title for the regulations of surface coal mining and reclamation operations for coal on lands within the State;

(5) establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 522 provided that the designation of Federal lands unsuitable for mining shall be performed exclusively by the Secretary after consultation with the State; and

(6) establishment for the purposes of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations; and

(7) rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.

(b) The Secretary shall not approve any State program submitted under this section until he has—

(1) solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise pertinent to the proposed State program;

(2) obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of a State program which relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151-1175), and the Clean Air Act, as amended (42 U.S.C. 1857 et seq.);

(3) held at least one public hearing on the State program within the State; and

(4) found that the State has the legal authority and qualified personnel necessary for the enforcement of the environmental protection standards.

The Secretary shall approve or disapprove a State program, in whole or in part, within six full calendar months after the date such State program was submitted to him.

(c) If the Secretary disapproves any proposed State program in whole or in part, he shall notify the State in writing of his decision and set forth in detail the reasons therefor. The State shall have sixty days in which to resubmit a revised

State program or portion thereof. The Secretary shall approve or disapprove the resubmitted State program or portion thereof within sixty days from the date of resubmission.

(d) For the purposes of this section and section 504, the inability of a State to take any action the purpose of which is to prepare, submit or enforce a State program, or any portion thereof, because the action is enjoined by the issuance of an injunction by any court of competent jurisdiction shall not result in a loss of eligibility for financial assistance under titles IV and VII of this Act or in the imposition of a Federal program. Regulation of the surface coal mining and reclamation operations covered or to be covered by the State program subject to the injunction shall be conducted by the State pursuant to section 502 of this Act, until such time as the injunction terminates or for one year, whichever is shorter, at which time the requirements of sections 503 and 504 shall again be fully applicable.

Section 504 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1254, provides:

(a) The Secretary shall prepare and, subject to the provisions of this section, promulgate and implement a Federal program for a State no later than thirty-four months after the date of enactment of this Act if such State—

(1) fails to submit a State program covering surface coal mining and reclamation operations by the end of the eighteen-month period begining on the date of enactment of this Act;

(2) fails to resubmit an acceptable State program within sixty days of disapproval of a proposed State program: *Provided*, That the Secretary shall not implement a Federal program prior to the expiration of the initial period allowed for submission of a State program as provided for in clause (1) of this subsection; or

(3) fails to implement, enforce, or maintain its approved State program as provided for in this Act.

If State compliance with clause (1) of this subsection requires an act of the State legislature, the Secretary may extend the period of submission of a State program up to an additional six months. Promulgation and implementation of a Federal program vests the Secretary with exclusive jurisdiction for the regulation and control of surface coal mining and reclamation operations taking place on lands within any State not in compliance with this Act. After promulgation and implementation of a Federal program the Secretary shall be the regulatory authority. If a Federal program is implemented for a State, section 522(a), (c), and (d) shall not apply for a period of one year following the date of such implementation. In promulgating and implementing a Federal program for a particular State the Secretary shall take into consideration the nature of that State's terrain, climate, biological, chemical, and other relevant physical conditions.

(b) In the event that a State has a State program for surface coal mining, and is not en-

subsection, and may impose such additional requirements as he deems to be necessary.

(6) All exceptions granted under the provisions of this subsection shall be reviewed not more than three years from the date of issuance of the permit, unless the permittee affimatively demonstrates that the proposed development is proceeding in accordance with the terms of the reclamation plan.

Section 518 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1268, provides:

(a) In the enforcement of a Federal program or Federal lands program, or during Federal enforcement pursuant to section 502 or during Federal enforcement of a State program pursuant to section 521 of this Act, any permittee who violates any permit condition or who violates any other provision of this title, may be assessed a civil penalty by the Secretary, except that if such violation leads to the issuance of a cessation order under section 521, the civil penalty shall be assessed. Such penalty shall not exceed $5,000 for each violation. Each day of continuing violation may be deemed a separate violation for purposes of penalty assessments. In determining the amount of the penalty, consideration shall be given to the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public;

whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.

(b) A civil penalty shall be assessed by the Secretary only after the person charged with a violation described under subsection (a) of this section has been given an opportunity for a public hearing. Where such a public hearing has been held, the Secretary shall make findings of fact, and he shall issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted, incorporating, when appropriate, an order therein requiring that the penalty be paid. When appropriate, the Secretary shall consolidate such hearings with other proceedings under section 521 of this Act. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code. Where the person charged with such a violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Secretary after the Secretary has determined that a violation did occur, and the amount of the penalty which is warranted, and has issued an order requiring that the penalty be paid.

(c) Upon the issuance of a notice or order charging that a violation of the Act has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the

fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

(d) Civil penalties owed under this Act, may be recovered in a civil action brought by the Attorney General at the request of the Secretary in any appropriate district court of the United States.

(e) Any person who willfully and knowingly violates a condition of a permit issued pursuant to a Federal program, a Federal lands program or Federal enforcement pursuant to section 502 or during Federal enforcement of a State program pursuant to section 521 of this Act or fails or refuses to comply with any order issued under section 521 or section 526 of this Act, or any order incorporated in a final decision issued by the Secretary under this Act, except an order incorporated in a decision issued under subsection (b) of this section or section 704 of this Act, shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than one year or both.

(f) Whenever a corporate permittee violates a condition of a permit issued pursuant to a Federal program, a Federal lands program or Federal enforcement pursuant to section 502 or Federal enforcement of a State program pursuant to section 521 of this Act or fails or refuses to comply with any order issued under section 521 of this Act, or any order incorporated in a final decision issued by the Secretary under this Act except an order incorporated in a decision issued under subsection (b) of this section or section 703 of this Act, any director, officer, or agent of such corporation who willfully and knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (e) of this section.

(g) Whoever knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plant, or other document filed or required to be maintained pursuant to a Federal program or a Federal lands program or any order of decision issued by the Secretary under this Act, shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than one year or both.

(h) Any operator who fails to correct a violation for which a citation has been issued under section 521(a) within the period permitted for its correction (which period shall not end until the entry of a final order by the Secretary, in

the case of any review proceedings under section 525 initiated by the operator wherein the Secretary orders, after an expedited hearing, the suspension of the abatement requirements of the citation after determining that the operator will suffer irreparable loss or damage from the application of those requirements, or until the entry of an order of the court, in the case of any review proceedings under section 526 initiated by the operator wherein the court orders the suspension of the abatement requirements of the citation), shall be assessed a civil penalty of not less than $750 for each day during which such failure or violation continues.

(i) As a condition of approval of any State program submitted pursuant to section 503 of this Act, the civil and criminal penalty provisions thereof shall, at a minimum, incorporate penalties no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto. Nothing herein shall be construed so as to eliminate any additional enforcement right or procedures which are available under State law to a State regulatory authority but which are not specifically enumerated herein.

Section 521(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1271 (a), provides:

(1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of

any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State had failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection.

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or

is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm.

(3) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502, or section 504(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any require-

ment of this Act or any permit condition required by this Act; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing.

If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. In the order of cessation issued by the Secretary under this subsection, the Secretary shall determine the steps necessary to abate the violation in the most expeditious manner possible, and shall include the necessary measures in the order.

(4) When, on the basis of a Federal inspection which is carried out during the enforce-

ment of a Federal program or a Federal lands program, Federal inspection pursuant to section 502 or section 504 or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that a pattern of violations of any requirements of this Act or any permit conditions required by this Act exists or has existed, and if the Secretary or his authorized representative also find that such violations are caused by the unwarranted failure of the permittee to comply with any requirements of this Act or any permit conditions, or that such violations are willfully caused by the permittee, the Secretary or his authorized representative shall forthwith issue an order to the permittee to show cause as to why the permit should not be suspended or revoked and shall provide opportunity for a public hearing. If a hearing is requested the Secretary shall inform all interested parties of the time and place of the hearing. Upon the permittee's failure to show cause as to why the permit should not be suspended or revoked, the Secretary or his authorized representative shall forthwith suspend or revoke the permit.

(5) Notices and orders issued pursuant to this section shall set forth with reasonable specificity the nature of the violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice or order applies. Each notice or order issued under this section shall be given promptly to the per-

vided, however, That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—

(A) surface operations and impacts are incident to an underground coal mine; or

(B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1960, the Federal Coal Leasing Amendments Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act: *And provided further,* That no surface coal mining operations may be permitted within the boundaries of the Custer National Forest;

(3) which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site;

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage

roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or

(5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

Section 525 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1275, provides:

SEC. 525. (a) (1) A permittee issued a notice or order by the Secretary pursuant to the provisions of subparagraphs (a) (2) and (3) of section 521 of this title, or pursuant to a Federal program or the Federal lands program or any person having an interest which is or may be adversely affected by such notice or order or by any modification, vacation, or termination of such notice or order, may apply to the Secretary for review of the notice or order within thirty days of receipt thereof or within thirty days of its modification, vacation, or termination. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an

opportunity for a public hearing, at the request of the applicant or the person having an interest which is or may be adversely affected, to enable the applicant or such person to present information relating to the issuance and continuance of such notice or order or the modification, vacation, or termination thereof. The filing of an application for review under this subsection shall not operate as a stay of any order or notice.

(2) The permittee and other interested persons shall be given written notice of the time and place of the hearing at least five days prior thereto. Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code.

(b) Upon receiving the report of such investigation, the Secretary shall make findings of fact, and shall issue a written decision, incorporating therein an order vacating, affirming, modifying or terminating the notice or order, or the modification, vacation, or termination of such notice or order complained of and incorporate his findings herein. Where the application for review concerns an order for cessation of surface coal mining and reclamation operations issued pursuant to the provisions of subparagraph (a)(2) or (a)(3) of section 521 of this title, the Secretary shall issue the written decision within thirty days of the receipt of the application for review, unless temporary relief has been granted by the Secretary pursuant to subparagraph (c) of this section or by the court pursuant to subparagraph (c) of section 526 of this title.

(c) Pending completion of the investigation and hearing required by this section, the appli-

cant may file with the Secretary a written request that the Secretary grant temporary relief from any notice or order issued under section 521 of this title, a Federal program or the Federal lands program together with a detailed statement giving reasons for granting such relief. The Secretary shall issue an order or decision granting or denying such relief expeditiously: *Provided*, That where the applicant requests relief from an order for cessation of coal mining and reclamation operations issued pursuant to subparagraph (a)(2) or (a)(3) of section 521 of this title, the order or decision on such a request shall be issued within five days of its receipt. The Secretary may grant such relief, under such conditions as he may prescribe, if—

(1) a hearing has been held in the locality of the permit area on the request for temporary relief in which all parties were given an opportunity to be heard;

(2) the applicant shows that there is substantial likelihood that the findings of the Secretary will be favorable to him; and

(3) such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources.

(d) Following the issuance of an order to show cause as to why a permit should not be suspended or revoked pursuant to section 521, the Secretary shall hold a public hearing after giving written notice of the time, place, and date thereof. Any such hearing shall be of record and shall be subject to section 554 of title

5 of the United States Code. Within sixty days following the public hearing, the Secretary shall issue and furnish to the permittee and all other parties to the hearing a written decision, and the reasons therefor, concerning suspension or revocation of the permit. If the Secretary revokes the permit, the permittee shall immediately cease surface coal mining operations on the permit area and shall complete reclamation within a period specified by the Secretary, or the Secretary shall declare as forfeited the performance bonds for the operation.

(e) Whenever an order is issued under this section, or as a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1538

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND RECLAMATION
ASSOCIATION, INC., ET AL.

On Appeal From The United States District Court For The Western District Of Virginia

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MOTION TO AFFIRM

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Secretary's regulatory and enforcement powers remain intact under the district court's order. Though cessation orders are now preconditioned on reasonable notice and an opportunity to be heard, the administrative process is under the Secretary's control and he can assure that it is not unduly cumbersome. In any case, as noted by the district court (J.S. App. D at 71a, 72a), a speedy remedy is available to the Secretary through applications to the district court for temporary restraining orders.

REASONS FOR AFFIRMANCE

The district court clearly analyzed and followed the precedents established by this Court in reaching a well-reasoned decision based upon an extensive trial record which fully supports that decision. The appellees believe that the three questions presented by the Secretary must be answered in a manner which affirms the decision of the district court.

1. Sections 515(d) And (e) Of The Surface Mining Control And Reclamation Act Of 1977 Violate The Tenth Amendment By Usurping The Power Of The Commonwealth Of Virginia To Regulate Land Use

Land use regulation has been consistently held by this Court and others to be within the inherent police powers of the states and of the counties, cities and towns which comprise their political subdivisions. *City of Euclid* v. *Ambler Realty, Co.*, 272 U.S. 365 (1926); *Berman* v. *Parker*, 348 U.S. 26 (1954); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *Construction Industry Association* v. *City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied.*, 424 U.S. 934; *West Brothers Brick Company* v. *Alexandria*, 169 Va. 271

(1937). Similarly, the power to authorize or restrict mining operations on lands within a state has heretofore been exercised exclusively by the states, counties, municipalities, and their designated agencies. *See, e.g., Midland Electric Coal Corporation* v. *Knox County,* 1 I11.2d 200, 115 N.E.2d 275 (1953); *Appeal of Mutual Supply Company,* 366 Pa. 424, 77 At.2d 612 (1951); *East Fairfield Coal Company* v. *Booth,* 166 O. 379, 143 N.E.2d 309 (1951); *Kane* v. *Kreiter,* 25 O. 2d 295, 195 N.E.2d 829 (1963). *See, also,* 10 ALR 3d. 1226 and cases cited therein. The federal government has not, prior to the Act, claimed any supervening authority in this area.

Though the district court concluded that there exists a federal commerce interest in regulating mining sufficient to support the Act generally,[3] its inquiry could not stop there for even when enacting valid legislation under the Commerce Clause Congress may not under the Tenth Amendment "displace the State's freedom to structure integral operations in areas of traditional governmental functions," *National League of Cities* v. *Usery,* 426 U.S. 833, 852 (1976), or "exercise [its] power in a fashion that impairs the States' integrity or their ability to function in a federal system." *Fry* v. *United States,* 421 U.S. 452 (1975). *National League of Cities* clearly requires the courts to balance the federal commerce interest against the State's interest in controlling its sovereign functions. The district court applied this principle, stating:

> "In considering the relief to be granted in a case like this, the state and federal government's in-

[3] Despite the Secretary's assertion to the contrary, this finding clearly demonstrates that the district court did give due deference to the legislative findings upon which the Act is based. To accept the position of the Secretary would place legislative findings beyond the scrutiny of the courts.

> terests must be balanced. The approximate original contour requirement imposed by the act is not environmentally sound and does not serve the conservation interests of the federal government. No harm will be visited upon the federal government nor to the environment to permanently enjoin this provision of the Act. On the other side, this provision and the postmining land use restrictions drastically affect the economy of the Commonwealth of Virginia, making it economically and physically impossible to mine coal, and prevent the state from using its land for agricultural purposes, for construction of airports, schools, hospitals, and for other activities. By recognizing these facts in granting relief, the preemptive power of the federal government through the commerce clause is recognized and the rights of the Commonwealth of Virginia as set out in the Tenth Amendment are preserved." J.S. App.40a,41a.

Such an analytical framework formed the basis for this Court's decision in National League of Cities. It has also been the rationale for decisions by other courts. *District of Columbia* v. *Train,* 521 F.2d 921 (1975); *Friends of the Earth* v. *Carey,* 552 F.2d 25 (2nd Cir. 1977). In balancing these interests the district court found that only those provisions which were excessively intrusive, or not rationally related to the objectives of the federal legislation, would be enjoined, but that other provisions of the Act which were not as intrusive would be allowed to stand. (J.S. App. D at 40a-41a). Such an analysis cannot be faulted by the Secretary.[4]

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[4] The Secretary's contention that the Act "regulates only coal mine operators, not States" is specious. While it is true that the Act regulates mine operators, it does so by usurping the regulatory powers of the States over land use. Sections 503 and 504 of the Act, 30 U.S.C. 1253 and 1254, clearly show that the Secretary is empowered not only to dictate what land use regulations are appropriate for the states, but also to supplant all state regulation with federal regulation if he deems it necessary. There is simply no valid basis for the argument that the integral affairs of state governments are not being regulated.

2. The District Court Properly Found That Sections 515(d) And 522(e) Of The Surface Mining Control And Reclamation Act Of 1977 Take Private Property Without Just Compensation In Violation Of The Fifth Amendment

On the basis of extensive trial evidence the district court found that returning a steep slope to original contour after surface mining is "economically infeasible and physically impossible," J.S. App. 37a, and enumerated the reasons why this is true. J.S. App. 38a. The court found as a fact that ninety-five percent of strippable coal reserves in Virginia are located on steep slopes, and that the Act effectively denies the owners of such lands of the right to remove the coal. Further, the court found, because the Act does not permit leaving the land in a level condition it denies the owner of the post-mining economic value of the land for higher potential use as level land suitable for agriculture, grazing of cattle or sheep, or construction of homes, schools, industrial sites, and shopping centers. As a result, the court found, "[I]ts value has been diminished to practically nothing," with a nominal value of from five dollars to seventy-five dollars an acre, "whereas, if it were left leveled or stabilized with benches, with roads already constructed it would be worth from five thousand dollars to three hundred thousand dollars per acre." J.S. App. 45a.

The court then proceeded to analyze the leading decisions of this Court relating to the "taking" clause, and discussed the rationale of each of these decisions, beginning with *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), through *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962); *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104 (1978); *Andrus*

v. *Allard,* No. 78-740, November 27, 1979; and *Kaiser Aetna* v. *United States,* No. 78-738, December 4, 1979. The court concluded that neither *Penn Central, Kaiser Aetna,* nor *Allard* overruled *Pennsylvania Coal Co.* v. *Mahon,* and that the latter case remains good law today.

Given these findings of the district court, this case falls squarely within the holding of this Court in *Pennsylvania Coal Company* v. *Mahon, supra.* As stated by Mr. Justice Holmes:

> " 'for practical purposes, the right to coal consists in the right to mine it.' What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." Id. at 414-15.

No statement of this Court is more closely on point. The statutes contested here by the Appellees[5] have the same confiscatory effects as the statute challenged in *Pennsylvania Coal Company.* Clearly, such a taking cannot be approved without requiring payment of just compensation.

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[5] It is frivolous for the Secretary to contend that the issue was not ripe for decision. The Virginia Surface Mining and Reclamation Association, Inc., demonstrated to the district court that its members had property interests in surface mineable coal subject to the requirements of Section 515 and 522 of the Act, 30 U.S.C. 1265 and 1272, and that such sections effectively prevent them from surface mining their coal. *Duke Power Company* v. *Carolina Environmental Study Group,* 438 U.S. 59 (1978).

3. The District Court Correctly Enjoined The Issuance Of Summary Cessation Orders Under Section 521(a)(2) Of The Surface Mining And Reclamation Act of 1977 And The Prepayment Of Penalties Under Section 518 Of The Act On The Ground That They Violate The Due Process Clause Of The Fifth Amendment.

The standard for determining whether the due process clause of the Fifth Amendment requires a hearing before imposition of sanctions was described by this Court in *Mathews* v. *Eldridge,* 424 U.S. 319 (1971). There the Court states:

> "that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probably value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

In the context of the instant case, there can be no question that the private interests involved are substantial in a constitutional sense. Not only does the issuance of cessation orders cause significant monetary losses to mine operators, but such orders can and have had the effect of driving mining companies out of business. (J.S. App. 65a-66a and 69a-70a respectively). *See, Pennsylvania Coal Co.* v. *Mahon, supra; R.A. Holhman and Co.* v. *SEC* 299 F.2d 127 (D.C. Cir.), *cert. denied,* 370 U.S. 911 (1970).

The second factor to be considered under *Mathews,* risk of erroneous deprivations, is also clearly present. The evidence before the district court identified a number of specific instances in which cessation orders were issued in an arbitrary and capricious manner. (J.S.-App. 65a-66a and 69a-70a). Moreover, at trial the Secretary was unable to identify even one instance in which the issuance of a cessation order was found to be necessary to protect health and safety or the environment. The lack of objective criteria upon which the Secretary's inspectors are to act requires them to make and implement purely subjective decisions.[6] Where there are no quantifiable guidelines upon which to base a summary deprivation of property, *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), where there is no provision for prior input by the operator, *Montrym* v. *Panora,* 429 F.Supp. 393 (D.Mass. 1977), and where the governmental action will effectively paralyze the operation of a business and drive its operator to the wall, *United States* v. *Vertol,* 545 F.2d 648, 651 (9th Cir. 1976), such a property deprivation has not been accomplished with due process of law. Moreover, where the loss cannot be compensated, the private interest is of such a magnitude that a pre-hearing taking can rarely be

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[6] The Secretary relies on *Sink* v. *Morton,* 529 F.2d 601 (4th Cir. 1975) to support the constitutionality of summary enforcement provisions. However, the enforcement provisions of the Federal Coal Mine Health and Safety Act of 1960, 30 U.S.C. 814(c) authorize summary withdrawal orders only where the inspector has found a violation of a mandatory health or safety standard of a nature that could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, where such violation is caused by an unwarrantable failure of the mine operator and where another such violation also exists, or is found to exist in an inspection conducted within 90 days after the operator is given notice of the first violation. Thus, such inspectors are guided by substantive, mandatory health or safety standards.

justified. *Stanley* v. *Illinois,* 405 U.S. 645 (1972); *Stypmann* v. *City and County of San Francisco,* 557 F.2d 1338 (9th Cir. 1977). The existence of each of these factors in the present case amply demonstrates that the second prong of the *Mathews* test has been met.

Finally, *Mathews* requires that the governmental interest in question be considered in light of the fiscal or administrative burdens that other procedural requirements would entail. This does not negate other considerations, but does require the court to balance the competing interests. Generally, a taking without a prior hearing to advance a valid government purpose can be justified only in extraordinary circumstances. *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). Where reasonable alternative means exist, they should be used. *Vlandis* v. *Klein,* 412 U.S. 441 (1973).

The Act will not involve a high volume of cases confronting the regulatory authority. Thus, unlike the situation in *Mathews,* the regulatory authority would not be confronted with a massive and excessively expensive burden if it were required to afford mine operators a hearing prior to issuance of a cessation order. Moreover, in similar circumstances, other federal agencies have been able to function adequately with presanction hearing requirements. *See* Federal Water Pollution Control Act of 1972, 33 U.S.C. 1364; Occupational Safety and Health Act, 29 U.S.C. 662. Similar procedures, as required by the district court, will adequately protect the governmental interest asserted under the Act, and the Secretary did not demonstrate otherwise at trial.

Section 518(c) of the Act, 30 U.S.C. 1268(c), also denies mine operators due process of law because it requires an operator who desires to contest a charge against him to post the proposed penalty in order to ob-

tain any administrative or judicial review of the alleged violation or the penalty being proposed thereon. The district court was not confused, as suggested by the Secretary (J.S. at 32), with respect to the nature of the prepayment requirement. On the contrary, the district court recognized that the "refund-with-interest" provision does not adequately protect operators because it ties up needed capital, and in any case, prepayment of penalties can have the effect of a cessation order where the mine operator is faced with the threat of continued daily monetary losses if he does not discontinue the alleged violation. (J.S. App. 69a-70a).[7] Quite simply, the District Court understood only too well that this tool can be used to pressure operators to correct questionable violations and to make unwarranted penalty payments in order to continue their operations without tieing up badly needed capital. *See, Star Coal Co.* v. *Andrus,* C.A. No. 79-171-2 (S.D. Iowa Feb. 13, 1980).

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[7] The Secretary has simply ignored these findings of the district court when he asserts that prepayment does not impose "significant burdens on mine operators" because interest on the prepaid penalty protects mine operators against financial injury. (J.S. at 33).

CONCLUSION

For the reasons stated herein, the decision of the district court should be affirmed as to all questions presented.

Respectfully submitted,

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Nos. 79-1538 and 79-1596

In the Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, APPELLANT

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1538

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, APPELLANT

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.*

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* Other plaintiffs below were A & S Coal Company; Amos Ridge Coal Co.; Bevins Mining Co., Inc.; Big Fork Coal Co.; Bill's Branch Coal Co.; Black Creek Coal Co.; Bob's Branch Coal Co.; Bossco, Inc.; Bradley Branch Coal Co.; Brushy Ridge Coal Co.; Buchanan & Sons; Burnrite Coal Co.; Cabot Coal Corp.; Cardinal Mining Ltd.; Chaparal Mining Co., Inc.; Charles D. Dale Coal Co.; Claude Yeary Coal Co.; Conley Mullins Coal Co.; Conway Coal Co.; Copeland Coal Co.; Curt's Coal Co.; Deena Coal Co.; Double D Coal Co.; Elkins-Kendrick Enterprises; Five Oaks Coal Co.; Flat Gap Mining Co.; Gale Coal Co., Inc.; Genoa Coal Co.; G & O Coal Co.; G & T Coal Co.; H.B. Rowe & Co.; H.C. Bostic Coal Co., Inc.; H.R.C. Coal Co., Inc.; Highland Enterprises; Hi Heat Coal Co.; Horn Construction Co., Inc.; Humphreys Enterprises; J.B. Coal Co.; Jil-Mar Coal Co., Inc.; Lyons Coal Co.; Laurel Creek Coal Co.; M & M Coal Co., Inc.; Mineral Developers, Inc.; Mullins Coal Co.; Mud Fork Coal Co.; Nu-Way Coal Co.; Paramount Mining Corp.; Permac, Inc.; Pilot Coal Corp.; P & R Coal Co.; Race Fork Coal Corp.; Rosebud, Inc.; Ryder Coal Co.; S & M Coal Corp.; Sherwood Mining, Inc.; Southwest Virginia Coal Corp.; St. Charles Mining Co.; Sterling Mining Co.; Trace Coal Co.; Tridale Coal Company; Turkey Branch Coal Co.; Valley Fork Coal Co.; Wise Dock Company; W.D. Martin; Charles J. Lowry; Robert W. Kelly, Jr.; A.F.

No. 79-1596

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE SECRETARY OF THE INTERIOR

QUESTIONS PRESENTED

1. Whether Title V of the Surface Mining Control and Reclamation Act of 1977 exceeds the congressional power to regulate interstate commerce under Article I, Section 8, of the Constitution.

2. Whether Sections 515(d) and (e) of the Act, which prescribe certain performance standards for surface coal mining operations conducted on steep slopes, violate the Tenth Amendment.

3. Whether the district court properly ruled that Sections 515(d) and 522 of the Act take private property without just compensation, in violation of the Fifth Amendment.

4. Whether the district court properly enjoined the issuance of summary cessation orders under Section 521(a)(2) of the Act and the imposition of civil penalties under Section 518 on the ground that those provisions violate the Due Process Clause of the Fifth Amendment.

Kelly; the Town of Wise, Virginia; and the Commonwealth of Virginia.

The Virginia Citizens for Better Reclamation, Inc., and the Town of St. Charles, Virginia, intervened as defendants in the district court. Their appeal to this Court (No. 79-1567) is pending.

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OPINIONS BELOW

The main opinion and the supplementary opinion of the district court (J.S. App. 21a-75a; 4a-16a) are reported at 483 F. Supp. 425.[1] The opinion of the court of appeals at the preliminary injunction stage (J.S. App. 76a-85a) is reported at 604 F.2d 312. The opinion of the district court at the preliminary injunction stage (J.S. App. 86a-101a) is not reported.

JURISDICTION

The final order of the district court (J.S. App. 17a-20a) was entered on January 3, 1980. An amending order (J.S. App. 1a-3a) was entered on January 21, 1980. The Secretary of the Interior filed a notice of appeal to this Court on February 1, 1980 (J.S. App. 102a-104a). Plaintiffs in the district court filed a notice of appeal to this Court on February 11, 1980 (79-1596 J.S. App. 1a-2a). On October 6, 1980, the Court noted probable jurisdiction in both appeals. The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Tenth Amendments to the United States Constitution and the relevant portions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.*, are reprinted in J.S. App. 106a-145a. The Commerce Clause in Article I, Section 8, of the Constitution is reprinted at 79-1596 Motion to Affirm 2.

STATEMENT

1. This appeal involves a pre-enforcement challenge to the constitutionality of several critical pro-

[1] Unless otherwise indicated, "J.S. App." refers to the appendix to the jurisdictional statement in No. 79-1538.

visions of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, 30 U.S.C. (Supp. I) 1201 *et seq.* Congress passed the Act in order to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. (Supp. I) 1202(a).

The principal regulatory and enforcement provisions of the statute are contained in Title V, 30 U.S.C. (Supp. I) 1251-1279.[2] Section 501 of the Act, 30 U.S.C. (Supp. I) 1251, establishes a two-stage program for the regulation of surface coal mining.[3] Section 501(a) provides for an initial, or interim, regulatory phase, and Section 501(b) provides for the subsequent, permanent phase of the program.

Section 501(a) directs the Secretary of the Interior to promulgate regulations covering an initial period during which mine operators will be required to comply with only some of the environmental protection performance standards established by the Act. Section 502(c) of the statute specifies which of the performance standards listed in Section 515 must be made applicable during this interim period. See 30

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[2] Title II of the Act creates the Office of Surface Mining Reclamation and Enforcement ("OSM") within the Department of the Interior. The Secretary of the Interior, acting through OSM, is charged with the principal responsibility for administering and implementing the Act. See 30 U.S.C. (Supp. I) 1211(c).

[3] Certain coal mining operations are exempt from the Act's requirements. They include: operations that affect two acres of land or less; operations involving the extraction of coal for personal, non-commercial use; and operations incident to a publicly financed highway project. See 30 U.S.C. (Supp. I) 1278.

U.S.C. (Supp. I) 1252(c), 1265.[4] In particular, Section 502(c) requires that Section 515(d), setting performance standards for "steep-slope" surface coal mining, must be implemented by the Secretary's interim regulations. In addition, certain other provisions of the Act become immediately effective by their own terms during the interim period. One example is Section 522(e), 30 U.S.C. (Supp. I) 1272(e), which prohibits, with various exceptions, surface coal mining on certain lands or within specified distances of certain structures or facilities. The Secretary promulgated his interim regulations on December 13, 1977 (42 Fed. Reg. 62639),[5] and they are currently

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[4] Under Sections 502(b) and (c) of the Act, the interim standards are applicable only to surface coal mining operations in states that were themselves regulating surface mining operations when the Act became law. All states in which surface mining was conducted on private land had regulatory programs of their own when the Act was passed in 1977. Accordingly, the interim program became applicable in all relevant areas throughout the Nation.

[5] Portions of the interim regulations have been challenged in the United States District Court for the District of Columbia pursuant to Section 526(a)(1) of the Act, 30 U.S.C. (Supp. I) 1276(a)(1). *In re Surface Mining Regulation Litigation*, 452 F. Supp. 327 (D.D.C. 1978); *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301 (D.D.C. 1978). Some of the statutory provisions at issue in the present case were also attacked in the District of Columbia litigation, and the district court sustained the validity of those provisions. See 456 F. Supp. at 1319-1321. The court of appeals affirmed in part and reversed in part the district court's ruling on the validity of the interim regulations. *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980). The statutory provisions sustained by the district court were not challenged on appeal.

in effect in all or nearly all states, including Virginia.[6]

Section 502(e) of the Act makes the Secretary responsible for enforcing the interim performance standards. 30 U.S.C. (Supp. I) 1252(e). The federal enforcement program to be established by the Secretary for the interim period is to remain in effect in each state until the permanent regulatory program is implemented in that state. States may continue to issue permits governing surface mining operations during the interim period, but any mining operations authorized by such permits must comply with the federal interim performance standards. 30 U.S.C. (Supp. I) 1252(b). States may pursue their own regulatory and inspection program during the interim period, and they may offer assistance in the Secretary's enforcement of the interim standards. Congress encouraged such assistance by providing for financial reimbursements to states that actively assist the federal enforcement effort during the interim period. See 30 U.S.C. (Supp. I) 1252(e)(4). The Act does not require any state to enforce any of the interim regulatory standards, however, and, until the permanent phase of the program, the statute does not authorize the Secretary to cede the federal government's independent enforcement role to states that wish to conduct their own regulatory programs.

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[6] In those states that have submitted to the Secretary proposed permanent state programs that the Secretary has subsequently approved and that have then been implemented by the states (see note 9, *infra*), the interim regulations remain in effect as to those mine operators that were operating under valid state permits during the interim program and that have submitted timely permit applications under the permanent program but have not yet received a decision from the state regulatory authority on their applications. 30 U.S.C. (Supp. I) 1256(a).

The permanent phase of the regulatory program is established by Section 501(b) of the Act, 30 U.S.C. (Supp. I) 1251(b). The statute directs the Secretary to promulgate regulations establishing a permanent regulatory program and incorporating all the performance standards set forth in the Act, including, of course, the "steep-slope" standards described in Section 515(d). The Secretary published his permanent program regulations on March 13, 1979 (44 Fed. Reg. 14902),[7] but their effectiveness in particular states must await the implementation of a permanent state program, submitted and approved in accordance with Section 503 of the Act, or a permanent federal program, adopted in accordance with Section 504. See 30 U.S.C. (Supp. I) 1253, 1254.

Section 503 of the Act provides that any state wishing to assume permanent regulatory authority over surface coal mining operations on "non-Federal lands" [8] within its borders must submit a proposed

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[7] The validity of portions of the Secretary's permanent regulations has also been challenged in the United States District Court for the District of Columbia, pursuant to Section 526(a)(1) of the Act. The district court has issued two opinions dealing with the permanent regulations. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. Feb. 26, 1980 and May 16, 1980). The first of these opinions is reported at 14 E.R.C. 1083. Two separate appeal proceedings involving the permanent regulations are pending in the court of appeals. *In re Permanent Surface Mining Regulation Litigation*, 14 E.R.C. 1813 (D.C. Cir. July 10, 1980), vacated and rehearing en banc granted (Aug. 25, 1980); *In re Permanent Surface Mining Regulation Litigation*, appeals pending, Nos. 80-1810 *et seq.* (D.C. Cir. Aug. 26, 1980).

[8] A regulatory program governing "Federal lands" is established separately in Section 523 of the Act, 30 U.S.C. (Supp. I) 1273. The term "Federal lands" is defined in Section 701(4), 30 U.S.C. (Supp. I) 1291(4), to mean "any land,

permanent program to the Secretary for his approval. The proposed state program must demonstrate that the state legislature has enacted laws implementing the environmental protection standards established by the federal statute and accompanying regulations and that the state has the administrative and technical ability to enforce these standards. 30 U.S.C. (Supp. I) 1253. The Secretary must approve or disapprove each such proposed program in accordance with the time schedules and procedures established by Sections 503(b) and (c).[9] In addition, the Secretary

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including mineral interests, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof, except Indian lands * * *." Section 710 of the Act, 30 U.S.C. (Supp. I) 1300, governs the regulation of surface mining on "Indian lands."

[9] Initially, the proposed state programs were to have been submitted by February 3, 1979, 18 months after enactment of the federal statute. Exercising his authority under Section 504(a) of the Act, the Secretary postponed the due date until August 3, 1979. 44 Fed. Reg. 15324 (1979). Because the Secretary's March 1979 publication of his permanent regulations occurred seven months after the date set by Congress (see 30 U.S.C. (Supp. I) 1251(b)), the United States District Court for the District of Columbia further extended the deadline for submission of state programs to and including March 3, 1980. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. July 25, 1979 and Aug. 21, 1979). The district court's injunctive order and subsequent opinion are reported at 13 E.R.C. 1447 and 13 E.R.C. 1586. See also 44 Fed. Reg. 60969 (1979) (announcing conforming changes in the Secretary's regulations governing submission of state programs).

With the exception of Georgia, Alaska, and Washington, all states in which surface mining is conducted or is expected to be conducted submitted proposed state programs to the Secretary by March 3, 1980. The Secretary has now made his initial decision on each of these programs. Three pro-

is required under Section 504 of the Act, 30 U.S.C. (Supp. I) 1254, to develop and implement a federal permanent program in each state that fails to submit or enforce a satisfactory state program.

2. On October 23, 1978, the Virginia Surface Mining and Reclamation Association, Inc., 63 of the Association's member coal companies, and four individual landowners filed this suit broadly challenging the constitutionality of Title V of the Act and, in particular, those statutory provisions to be implemented during the interim phase of the regulatory program. The Commonwealth of Virginia and the Town of Wise, Virginia, intervened as plaintiffs. The Virginia Citizens for Better Reclamation, Inc., and the Town of St. Charles, Virginia, intervened as defendants in support of the Secretary's enforcement of the Act.

Plaintiffs advanced several arguments against the Act's validity. They contended: (1) that the statute is beyond the scope of the congressional power to regulate interstate commerce under Article I, Section 8, of the Constitution; (2) that the Act has a disproportionate economic effect in southwest Virginia and thereby violates the equal protection component of the Due Process Clause of the Fifth Amendment; (3) that the Act violates the Tenth Amendment because

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grams have been approved, eight have been approved on the condition that the state agree to some modifications, ten have been approved in part and disapproved in part, and three have been disapproved, apparently because of the state legislatures' failure to enact the necessary implementing statutes. Virginia's program was approved in part and disapproved in part. See 45 Fed. Reg. 69977 (Oct. 22, 1980). Under Section 503 of the Act, a state may revise a plan that has been disapproved in whole or in part and resubmit it to the Secretary within 60 days of the Secretary's initial decision.

it usurps an "integral governmental function" traditionally reserved to and performed by the states; (4) that, by imposing certain restrictions and conditions on surface mining operations, the Act effects a taking of private property without just compensation, in violation of the Fifth Amendment; and (5) that the Act's enforcement provisions, especially those establishing a system of civil penalties and authorizing cessation orders against imminently dangerous conditions and practices, deny coal mine operators due process of law, in violation of the Fifth Amendment.

On February 14, 1979, after a hearing on plaintiffs' motion for a preliminary injunction, the district court enjoined the Secretary from taking any action to enforce Sections 502-522 of the Act pending final disposition of plaintiffs' action on the merits (J.S. App. 86a-101a). The district court and the court of appeals denied the Secretary's application for a stay pending appeal of the preliminary injunction.

On August 10, 1979, the court of appeals reversed and dissolved the district court's injunction (J.S. App. 76a-85a). The court of appeals held that the district court had applied an incorrect standard in determining whether to grant preliminary injunctive relief and had not made the necessary findings that plaintiffs were likely to succeed on the merits and that a preliminary injunction would "not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources." See 30 U.S.C. (Supp. I) 1276(c). The court of appeals further observed that the district court had "wholly ignored the Congressional findings set forth in § 101 of the Act" (J.S. App. 83a; 30 U.S.C. (Supp. I) 1201).

While the Secretary's appeal of the preliminary injunction was pending, the district court held a 13-day trial on plaintiffs' request for a permanent injunc-

tion.[10] On January 3, 1980, the court issued an order (J.S. App. 17a-20a) and opinion (*id.* at 21a-75a) declaring several critical provisions of the Act unconstitutional and permanently enjoining their enforcement. The court rejected plaintiffs' Commerce Clause and equal protection challenges to the Act (*id.* at 26a-29a, 41a-42a). The court held, however, that the Act "operates to displace the states' freedom to structure integral operations in numerous areas of traditional functions and is in contravention of the Tenth Amendment" (*id.* at 18a; see *id.* at 30a-41a). In particular, the court ruled that "[t]he portions of the act requiring steep slopes to be restored to approximate original contour are not environmentally sound and do not serve the interests of the federal government and are so burdensome on the Commonwealth of Virginia as to threaten its economy" (*id.* at 18a). The court therefore enjoined the enforcement of the steep-slope mining standards contained in Sections 515(d) and (e) of the Act, 30 U.S.C. (Supp. I) 1265(d) and (e).

The district court also held that Sections 515(d) and (e) of the Act violate the Just Compensation Clause of the Fifth Amendment. In the court's view, Section 515(d) effects an uncompensated taking of private property by requiring steep-slope coal mine operators to restore the approximate original contour of the land after the completion of mining opera-

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[10] The court heard testimony from several state and federal officials, expert witnesses, coal mine operators, and Virginia residents regarding the feasibility and desirability of the Act's regulatory requirements, the history of surface coal mining regulation in Virginia, the effects of surface coal mining on the environment and the public health and safety, the current condition of the surface coal mining industry in Virginia, and the comparative merits of state and federal regulation of surface coal mining.

tions. The court said that this statutory obligation renders it "physically and economically impossible to mine the coal" on steep slopes (J.S. App. 45a). The court found another unconstitutional taking in Section 522 of the Act, 30 U.S.C. (Supp. I) 1272, subsection (e) of which generally prohibits surface coal mining within 100 feet of any cemetery or the "outside right-of-way line of any public road," within 300 feet of any public building, school, church, public park, or occupied dwelling, or anywhere within national parks, national forests, wildlife refuges, and registered historic sites.[11] Accordingly, the court declared Sections 522 and 515(d) and (e) unconstitutional "until such time as the federal government sees fit to obtain said land by eminent domain and payment of just compensation" (J.S. App. 19a; see *id.* at 43a-57a).

Finally, the court considered plaintiffs' due process objections to the enforcement provisions of the Act. The court ruled that, before ordering the immediate cessation of any mining practice or condition, the Secretary must either seek judicial intervention or afford mine operators an opportunity for a hearing. The court held that this requirement applies even in cases where the Secretary determines, on the basis of

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[11] The prohibitions in Section 522(e) are subject to "valid existing rights" and do not apply to mining operations in existence on the date of the statute's enactment. See 30 C.F.R. 761.3, 44 Fed. Reg. 15342 (1979). Furthermore, several of the Section 522(e) prohibitions are subject to waiver. For example, Section 522(e)(2) specifies circumstances in which surface coal mining may be permitted in national forests; Section 522(e)(4) permits waivers or adjustments of the prohibition against surface mining within 100 feet of roadways; and Section 522(e)(5) provides that the prohibition against surface mining within 300 feet of an occupied dwelling may be waived by the dwelling's owner.

a federal inspection, that a particular practice or condition "creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources." Because Section 521(a)(2) of the Act, 30 U.S.C. (Supp. I) 1271(a)(2), authorizes the issuance of cessation orders in such circumstances without a prior hearing, and because, in the court's view, the statute does not provide sufficient guidance concerning the occasions on which such orders are appropriate, the court declared the statute unconstitutional and enjoined its enforcement (J.S. App. 19a, 57a-74a). Although only Section 521(a)(2) authorizes immediate cessation orders, the court's order enjoined subsections (a)(1) and (a)(3) as well (J.S. App. 19a). The court's opinion stated that "[t]he summary issuance of cessation orders is enjoined until such time as Congress makes provisions to correct the use of subjective criteria by [federal] inspectors" (*id.* at 73a).

The court found fault with two additional aspects of the Act's enforcement procedures. Under Section 525(c) of the Act, 30 U.S.C. (Supp. I) 1275(c), mine operators subject to a cessation order may seek temporary relief from the Secretary. If the cessation order from which relief is sought has been issued under Section 521(a)(2) or (3), the Secretary must act on the application within five days of receipt. The district court ruled that this statutory five-day period is too long and that the Secretary should be required to grant or deny the operator's request within 24 hours (J.S. App. 73a). Apparently in order to effectuate this statutory revision, the court's January 3 order enjoined Section 525 in its entirety (*id.* at 19a). The court also enjoined Section 518 of the Act, 30 U.S.C. (Supp. I) 1268, the

statute's penalty provision. Although the court's order seemed to enjoin Section 518 in its entirety (J.S. App. 19a), the accompanying opinion showed that the court disapproved only the final imposition of civil penalties without an opportunity for a prior hearing (see *id.* at 67a-69a, 74a). The court apparently thought that Section 518, especially when read together with the cessation order provision in Section 521(a)(2), can result in an irrevocable assessment of penalties before any administrative review procedures are made available (*id.* at 68a-69a).

On January 21, 1980, the district court denied the Secretary's motion for a stay pending direct appeal to this Court (J.S. App. 3a). At the same time the court issued an order and opinion (*id.* at 1a-3a, 4a-16a) clarifying its January 3 decision. The court modified its earlier order in two respects. First, the court declared that its injunction against enforcement of the steep-slope mining standards contained in Section 515(d) was not intended to "allow[] spoil to be placed on the downslope in an uncontrolled manner." The court stated that "[a]ny such downslope spoil placement shall be in a controlled manner meeting environmental protection standards specified by the regulatory authority" (*id.* at 2a). Second, the court announced that the declaratory and injunctive relief awarded against Sections 518, 521, and 525 of the Act applies "*only* insofar as those sections relate to summary issuance of cessation orders and civil penalties" (J.S. App. 2a-3a; emphasis in original).

The Secretary applied to this Court for a stay of the district court's judgment pending appeal (No. A-720). On February 25, 1980, the Chief Justice granted a stay pending further order of the Court, and on March 17, 1980, the Court extended the stay

"pending the timely filing and disposition" of the Secretary's appeal (J.S. App. 105a).

On October 6, 1980, the Court noted probable jurisdiction in the Secretary's appeal (No. 79-1538) and in the cross-appeal filed by plaintiffs (No. 79-1596). The Court consolidated the two appeals and set them for hearing in tandem with *Andrus* v. *Indiana*, No. 80-231, which involves similar challenges to the constitutionality of the Surface Mining Act.

SUMMARY OF ARGUMENT

I

Title V of the Surface Mining Act does not exceed Congress' power under the Commerce Clause. After a comprehensive legislative investigation, Congress found that surface mining operations adversely affect interstate commerce by causing erosion and landslides, by contributing to floods and polluting the water, by destroying fish and wildlife habitats, and by creating dangerous hazards to life and property in coal-mining communities. Congress enacted the surface mining performance standards in Title V in order to protect the environment and the public health and safety.

Congress' factual findings regarding the effects of surface mining on interstate commerce are not irrational, and the means chosen in Title V to deal with these effects are rationally related to the legitimate legislative purpose. That is all that a reviewing court must determine in order to sustain a congressional exercise of the power to regulate interstate commerce. The district court therefore correctly rejected plaintiffs' challenge to Title V under the Commerce Clause.

II

The "steep-slope" performance standards in Sections 515(d) and (e) of the Act do not violate the

Tenth Amendment. The requirements that surface mine operators reclaim mined areas by covering the highwall and restoring the land to its approximate original contour, and that they refrain from dumping spoil on the downslope beneath the mining cut, are addressed solely to the mine operators, not to the "States as States." The Surface Mining Act does not compel the states to do anything whatever.

The "steep-slope" provisions in the Act are thus significantly different from the mandatory federal minimum-wage legislation that this Court invalidated as applied to the states in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). The district court relied erroneously on *National League of Cities* in the present case when it held that Sections 515(d) and (e) of the Act "displace the states' freedom to structure integral operations in numerous areas of traditional functions" and therefore violate the Tenth Amendment. Not only do the "steep-slope" provisions impose no requirements on the states themselves, but surface coal mining is not the kind of "integral governmental function," like police protection or fire prevention, to which this Court referred in *National League of Cities*.

Only two years after the decision in *National League of Cities*, this Court summarily rejected a Tenth Amendment challenge to a federal statute on grounds similar to those now advanced by plaintiffs. *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 84 n.27 (1978). The result should be no different here. A proper exercise of congressional power under the Commerce Clause is not invalid merely because it may have some adverse impact on state and local economies and tax revenues.

III

Sections 515(d) and (e) and 522 of the Act do not take private property without just compensation, in violation of the Fifth Amendment. The district court's ruling to the contrary is based almost entirely on a refusal to grant an appropriate measure of deference to the factual findings made by Congress. Rather than reviewing the legislative findings under the rationality standard repeatedly endorsed by this Court (see, *e.g.*, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-154 (1938)), the district court conducted a 13-day hearing, reweighed the evidence, and, on that basis, overturned the product of several years of legislative work.

The congressional finding that restoration of surface-mined land to its approximate original contour is both physically and economically feasible and environmentally sound is a rational finding supported by ample evidence in the legislative record. The objections to this conclusion now advanced by plaintiffs were fully considered and rejected during the congressional deliberations on the Act. They should not now be subject to a *de novo* judicial reexamination.

An additional important flaw mars the district court's ruling that Sections 515(d) and 522 (e) of the Act take private property, in violation of the Just Compensation Clause. The decision departs significantly from this Court's precedents under the Fifth and Fourteenth Amendments, which establish standards for determining when government regulation rises to the level of a taking. When government regulation serves a substantial public purpose, it ordinarily will not be found to take private property unless it is so intrusive as to prevent all beneficial uses of that property. Mere diminution in the value

of property does not effect a taking. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978).

The Surface Mining Act does not entail any physical invasion or actual government acquisition of private land. In most locations, it permits surface mining operations, subject only to conditions designed to protect the environment and the public health and safety and to ensure restoration of the land after mining has been completed. The Act prohibits surface mining only in certain narrowly defined areas within a specified radius of roads, schools, churches, parks, public buildings, and cemeteries. This is a reasonable regulatory measure that leaves the vast majority of beneficial uses of property completely unaffected.

Moreover, this Court's decisions regarding regulation of noxious uses of private property suggest that the Surface Mining Act would pass constitutional muster, even if the statute were considerably more restrictive. The Court has indicated in a long line of cases that, where government regulation of property use is analogous to prohibition of a nuisance, it will be sustained, even if it leaves no beneficial use available. See, *e.g.*, *Mugler* v. *Kansas*, 123 U.S. 623 (1887); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915).

Finally, the approximate original contour requirement in Section 515(d) and the surface mining restrictions in Section 522(e) are, respectively, subject to the variance provisions in Sections 515(c) and (e) and the waiver provisions in Section 522(e). These provisions are intended to ameliorate harsh results that may be caused by the Act in individual circumstances. The district court ignored the waiver and variance provisions and thus contributed to its er-

roneous holding that the Act on its face takes private property without just compensation.

IV

Plaintiffs' due process challenge to the summary cessation order procedure established by Section 521 (a) (2) of the Act and the civil penalty procedure under Section 518 is premature. No plaintiff has alleged or proved that it has suffered any injury as the result of the issuance of a summary cessation order or the imposition of a civil penalty. In the absence of such actual harm, the district court should not have addressed plaintiffs' Due Process Clause arguments.

In any event, neither Section 521(a) (2) nor Section 518 violates the due process guarantee in the Fifth Amendment. Section 521(a) (2) authorizes the issuance of a summary cessation order only when a surface mining operation is in violation of the Act and "creates an imminent danger to the health or safety of the public" or causes "significant, imminent environmental harm to land, air, or water resources * * *." Immediate administrative action in such circumstances is fully consistent with due process.

This Court has frequently recognized that, in extraordinary and emergency situations, summary administrative action may be justified. The statutory standards for the issuance of summary cessation orders under Section 521(a) (2) are quite similar to the criteria provided by Congress in other instances where summary administrative action has been upheld against due process challenges. See cases cited on pages 62-63, 65, *infra*.

Moreover, Congress has included in the Act a comprehensive administrative review procedure designed to ensure that mine operators aggrieved by agency action may obtain a full hearing as expeditiously as

possible. In particular, the Act provides that operators subject to summary cessation orders are entitled to apply for temporary relief and to receive a decision on that application, subject to judicial review, within five days of its receipt by the Secretary. In addition, the operator is entitled to an informal hearing at the mine site within 30 days of the issuance of the cessation order and thereafter to a full evidentiary hearing in accordance with Section 5 of the Administrative Procedure Act, 5 U.S.C. 554. Together, these procedures strike a reasonable balance between the mine operators' legitimate interest in the uninterrupted extraction of coal and the overriding governmental interest in protecting the environment and the public from dangerous conditions.

The civil penalty provisions in Section 518 likewise satisfy the requirements of due process. Regardless of how the district court may have interpreted the statute, the fact is that no civil penalties are finally assessed until after the affected mine operator has had an opportunity for a hearing. A mine operator who has allegedly violated the Act is informed of the amount of any proposed penalty the Secretary intends to assess and, if the operator "wishes to contest either the amount of the penalty or the fact of the violation," he must "forward the proposed amount to the Secretary for placement in an escrow account." If, after administrative or judicial review, it is determined that no violation occurred or that the proposed penalty should be reduced, the appropriate amount is promptly returned to the operator with interest.

Even standing alone, Section 518 does not violate the Due Process Clause. At least in the absence of some particularized showing of hardship in an individual case, the statutory provision for prepayment

of proposed penalties, coupled with a later refund of excess payments plus interest, adequately protects the mine operators' financial position and simultaneously advances the congressional goal of facilitating the collection of penalties. Under this Court's decisions, due process does not inevitably require a hearing before any deprivation occurs. A full hearing at some time is ordinarily sufficient, and it is undisputed that that is provided by Section 518.

Furthermore, in the present case, the Secretary's construction and application of the Act as a whole deprives plaintiffs' due process argument of whatever force it might otherwise have. In his regulations (43 C.F.R. 4.1100 *et seq.*), the Secretary has construed Sections 518 and 525 of the Act to create two separate avenues of administrative review, and, under the Secretary's interpretation, a mine operator who has received a notice of violation or a cessation order may obtain a full hearing on the fact of the violation without regard to Section 518's prepayment requirement. An operator must seek review under Section 518 (and comply with the prepayment requirement) only if he wishes to challenge not only the fact of the violation but also the amount of the penalty. Even in that event, however, the operator does have an opportunity to obtain some review of the amount of the penalty before prepayment, in an informal conference that the Secretary must hold at the operator's request. See 30 C.F.R. 723.17, 42 Fed. Reg. 62703-62704 (1977).

For all these reasons the civil penalty provisions in Section 518 do not violate the Due Process Clause.

ARGUMENT

I

TITLE V OF THE SURFACE MINING ACT DOES NOT EXCEED CONGRESS' POWER UNDER THE COMMERCE CLAUSE

The district court correctly rejected plaintiffs' Commerce Clause challenge to Title V of the Surface Mining Act, and that portion of the decision below should be affirmed.

As already explained (see page 2, *supra*), Title V contains the Act's principal regulatory and enforcement provisions. Plaintiffs attacked the statute on the ground that it "purports to regulate reclamation of private lands" and other "activities of a local character within the recognized scope of the police powers of the Commonwealth of Virginia" (Complaint ¶¶ 16, 17). In this Court, plaintiffs have asserted (79-1596 J.S. 4) that Title V is "directed not to the 'commerce' aspects of surface mining, i.e. the operations involved in extraction, transportation and sale of surface mined coal, but deals entirely with aspects of land use." On this basis, plaintiffs have argued that Title V exceeds the congressional power to regulate interstate commerce under Article I, Section 8, of the Constitution.

The district court properly deferred to the express congressional findings regarding the effects of surface mining on interstate commerce and therefore held that "the federal surface mining act is within the scope of the commerce clause" (J.S. App. 26a). Congress found that surface mining operations adversely affect interstate commerce in several specific ways, and the Surface Mining Act itself includes a description of the adverse effects identified by Congress. Section 101(c) of the Act, 30 U.S.C. (Supp. I) 1201(c), declares Congress' finding that

> many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

See also 30 U.S.C. (Supp. I) 1201(g) ("surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders"); 30 U.S.C. (Supp. I) 1201(j) ("surface and underground coal mining operations affect interstate commerce").

The statutory findings concerning the effects of surface mining on interstate commerce are amply supported in the legislative record,[12] and the district court did not quarrel with the congressional judg-

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[12] See, *e.g.*, H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 58-60, 96-122 (1977); S. Rep. No. 95-128, 95th Cong., 1st Sess. 50-52, 54 (1977). The cited excerpts from the 1977 committee reports are distillations from vast amounts of testimony and documentary material brought to the attention of Congress during the tortuous and lengthy legislative history of the Surface Mining Act. This history is outlined in the Appendix, *infra*.

ment in this regard. In fact, the court adopted the legislative characterization of the Surface Mining Act as an effort to protect commerce from the harmful effects of surface mining. The court stated (J.S. App. 28a-29a; footnote omitted):

> There is no question that coal moves in interstate commerce and that its production has a substantial effect on the national economy. * * * The Surface Mining Control and Reclamation Act of 1977 is an attempt by Congress to insure that surface mining of this valuable commodity is accomplished with regard to its impact on interstate commerce and the public welfare. Congressional recognition of the enormous and multi-faceted implications for commerce of improper reclamation * * * pervades the act's legislative history. Congress considered improper surface mining and reclamation a threat to the productivity of the mined land in terms of its ability to support other important forms of commerce. * * * Surface mining of coal in the United States may involve the temporary or permanent degradation of vast tracts of lands, a problem greatly magnified by developing mining technologies. If the land is not reclaimed in a manner that subjects it to further use, then the productivity of that land is lost to present as well as future generations, reducing the flow of other valuable items in interstate commerce. More important than the adverse economic effects on interstate commerce, however, are the *potential* costs in terms of stream pollution, floods, landslides, loss of fish and wildlife habitats, erosion of other lands, and hydrological imbalances that cumulatively have a substantial impact on interstate commerce.

Having thus acknowledged the relationship between surface mining operations and interstate com-

merce, the district court correctly recognized that its role on judicial review was limited to determining whether Congress had a "rational basis" for enacting a particular regulatory scheme for the protection of commerce (J.S. App. 28a). After considering the provisions of the statute under attack, the court concluded that "Congress had a real and substantial rational basis for enacting the federal surface mining act to protect commerce and the national interest" (*id.* at 29a). This decision is fully consistent with the many precedents from this Court governing the proper standards for judicial review of Commerce Clause legislation. Accordingly, the district court's ruling should be affirmed in this respect.

The Commerce Clause grants Congress plenary power "[t]o regulate commerce * * * among the several States * * *." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *National League of Cities* v. *Usery*, 426 U.S. 833, 840 (1976); *Cleveland* v. *United States*, 329 U.S. 14, 19 (1946). This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden*, *supra*, 22 U.S. (9 Wheat.) at 196. In particular, this Court has repeatedly held that the Commerce Clause power extends not only to "the use of channels of interstate or foreign commerce" and "protection of the instrumentalities of interstate commerce * * * or persons or things in commerce," but also to "activities affecting commerce." *Perez* v. *United States*, 402 U.S. 146, 150-152 (1971), and cases there cited.

In determining whether a particular exercise of power is valid under the Commerce Clause, a reviewing court must defer to a finding by Congress that the regulated activity affects interstate commerce, if there is any rational basis for that finding. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241,

258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 424 (1940). If there is a rational basis for such a finding, the only remaining question for judicial consideration is whether the means selected by Congress for the regulation of commerce are "reasonable" and "rational." *Heart of Atlanta Motel, Inc., supra*, 379 U.S. at 258-259; *Katzenbach* v. *McClung, supra*, 379 U.S. at 304. Once a court determines that Congress acted rationally in adopting a particular regulatory scheme, the judicial inquiry is completed. *Ibid.*

Plaintiffs concede (79-1596 J.S. 6) that coal is a commodity that moves in interstate commerce. They also apparently do not challenge the congressional findings regarding the effects of surface coal mining on interstate commerce. Plaintiffs contend, however, that the Surface Mining Act exceeds Congress' power under the Commerce Clause, because the statute deals with "aspects of land use" rather than "the operations involved in extraction * * * of surface mined coal" (*id.* at 4). Plaintiffs have not explained this purported distinction, and it is difficult to understand how Congress could regulate the extraction of surface mined coal—which plaintiffs seemingly agree is a permissible exercise of the Commerce Clause power—without at the same time affecting some "aspects of land use." In any event, the distinction drawn by plaintiffs is fallacious, because it entails a significant mischaracterization of the purpose of the Surface Mining Act.

The regulatory scheme created by Title V of the Act is in fact primarily concerned with "operations involved in extraction * * * of surface mined coal." That is the very subject with which the statute was intended to deal. As described above, Congress based its decision to adopt the Surface Mining Act on ex-

press findings that the methods used in extracting coal frequently have a direct and adverse impact on interstate commerce. Plaintiffs have offered no basis for concluding either that Congress' findings are irrational or that the means chosen for controlling the adverse impacts of surface coal mining are ill-suited to the task. The federal courts have uniformly held that the power conferred by the Commerce Clause is broad enough to permit Congress to regulate activities giving rise to air pollution, water pollution, or other environmental hazards,[13] and plaintiffs do not dispute that the kinds of problems identified by Congress can appropriately be addressed through Commerce Clause legislation. In these circumstances, there is no remaining foundation for plaintiffs' argument that, because of its likely effects on land use, the Surface Mining Act exceeds congressional power to regulate interstate commerce.

The Surface Mining Act does not require that land be used in any particular way. It does not require that coal be mined and it does not prohibit the surface mining of coal, except in certain narrowly defined situations. It also does not mandate a particular postmining land use once the operator's performance

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[13] See, *e.g.*, *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979); *Sierra Club* v. *EPA*, 540 F.2d 1114, 1139 (D.C. Cir. 1976), cert. denied, 430 U.S. 959 (1977); *Bethlehem Steel Corp.* v. *Train*, 544 F.2d 657, 663 (3d Cir. 1976), cert. denied, 430 U.S. 975 (1977); *District of Columbia* v. *Train*, 521 F.2d 971, 988 (D.C. Cir. 1975), vacated and remanded on other grounds *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977) (per curiam); *United States* v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974); *Pennsylvania* v. *EPA*, 500 F.2d 246, 259 (3d Cir. 1974); *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 677 (1st Cir. 1974); *United States* v. *Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968), aff'd, 423 F.2d 469 (4th Cir.), cert. denied, 398 U.S. 904 (1970).

bond has been released. The Act provides only that mining operations must be conducted subject to certain precautions and restrictions, and, if surface mining methods are used, mined land must be restored to its approximate original contour at the completion of mining activities. Plaintiffs' charge that the Act was intended to control land-use decisions by private property owners is simply inaccurate.

Plaintiffs' further assertion (79-1596 J.S. 4-5) that, by enacting Title V, Congress has "created a comprehensive body of federal police powers designed to supplant the inherent police powers of State and local governments" adds nothing to their argument. As this Court has stated, "[i]t is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States* v. *Darby*, 312 U.S. 100, 114 (1941); *Cleveland* v. *United States*, *supra*, 329 U.S. at 19; *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 582 (1942); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 147 (1938). The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over purely intrastate commerce. *United States* v. *Darby*, *supra*, 312 U.S. at 116; *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, 569-570 (1939). Moreover, as this Court has recently reaffirmed (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 840), Congress, in regulating private activities that affect interstate commerce, may preempt state laws that are contrary to the federal regulatory scheme. In particular, the Commerce Clause authorizes Congress to preempt state police power regulations that are inconsistent with the federal statute governing surface coal min-

ing activities.[14] Plaintiffs' contention that the Surface Mining Act exceeds the delegated power of Congress is, therefore, without merit.[15]

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[14] Plaintiffs have cited no pertinent authority in support of their argument that the Surface Mining Act is outside the scope of Congress' power under the Commerce Clause. Several of the cases to which plaintiffs refer (79-1596 J.S. 5) merely held that regulation of private land use is within the inherent police powers of the states and their political subdivisions, but these cases in no way suggest that such powers are exclusive or that the federal government may not regulate private activities that affect interstate commerce. The other decisions cited by plaintiffs (*id.* at 6) hold only that the states retain authority to regulate activities that do not affect interstate commerce and activities that may affect interstate commerce but concerning which Congress has not chosen to legislate.

[15] The present case is not the only one in which a federal district court has considered a Commerce Clause challenge to the Surface Mining Act or to the Act's application in particular circumstances. Such challenges have also been rejected in *Andrus* v. *P-Burg Coal Co.*, 495 F. Supp. 82 (S.D. Ind. 1980), appeal pending, No. 80-1916 (7th Cir.), and *Star Coal Co.* v. *Andrus*, Civ. No. 79-171-2 (S.D. Iowa Feb. 13, 1980) (failure to demonstrate probability of success on merits), appeal pending on other grounds, No. 80-49. See also *Concerned Citizens of Appalachia, Inc.* v. *Andrus*, 494 F. Supp. 679, 683 (E.D. Tenn. 1980), appeal pending, No. 80-1448 (6th Cir.) (rejecting Tenth Amendment challenge to the Surface Mining Act and commenting that "[t]he Congressional purpose of protecting the environment from dangers arising in the course of nationally significant commercial activity is well within the Commerce Clause power" and "[t]he means used to achieve that purpose are directly and rationally related to activity subject to Congressional regulation under the Commerce Clause").

The only case in which a Commerce Clause objection to the Surface Mining Act has been sustained is *Indiana* v. *Andrus*, Civ. Nos. IP 78-500-C and IP 78-501-C (S.D. Ind. June 10, 1980), appeal pending, No. 80-231. The district court's opinion in *Indiana* did not treat Title V as an undif-

II

THE "STEEP SLOPE" PROVISIONS OF THE SURFACE MINING ACT DO NOT VIOLATE THE TENTH AMENDMENT

Sections 515(d) and (e) of the Surface Mining Act set performance standards for surface mining on "steep slopes." [16] Section 515(d) requires an operator conducting surface mining on steep slopes (i) to reclaim the mined area by completely covering the highwall and returning the site to its "approximate original contour," [17] (ii) to refrain from dumping spoil material on the downslope below the bench or mining cut, and (iii) to refrain from disturbing land above

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ferentiated whole but focused primarily on the so-called "prime farmland" provisions of the Act, which are not at issue here. The Commerce Clause aspects of the district court's ruling in *Indiana* are discussed in Part I of the Secretary's brief in that case, a copy of which will be sent to plaintiffs here.

[16] Under Section 515(d)(4), a "steep slope" is defined as "any slope above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or State."

[17] The term "approximate original contour" is defined in Section 701(2) of the Act, 30 U.S.C. (Supp. I) 1291(2), as follows:

> "approximate original contour" means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated * * *.

(The word "approximate" in Section 515(d)(2) was erroneously printed as "appropriate" in the final version of the statute.)

the highwall, unless permitted to do so by the regulatory authority. 30 U.S.C. (Supp. I) 1265(d). Section 515(e) establishes a procedure by which a steep-slope mine operator may obtain a variance from the approximate original contour requirements of Section 515(d), if such a variance is needed to render the land suitable for a post-reclamation industrial, commercial, residential, or public use that is "deemed to constitute an equal or better economic or public use" than would otherwise be possible. 30 U.S.C. (Supp. I) 1265(e).[18]

The district court held that Sections 515(d) and (e) violate the Tenth Amendment (J.S. App. 30a-41a). The court reached this result on the basis of purported "findings" that the steep-slope mining requirements force the Commonwealth of Virginia to relinquish control over land-use planning, deprive the Commonwealth of authority over its economy, and cause actual economic harm (*id.* at 33a-39a). In particular, the district court stated that compliance with the steep-slope mining requirements is "economically infeasible and physically impossible" (*id.* at 37a). Relying heavily on *National League of Cities* v. *Usery*, *supra*, the district court concluded that the Surface Mining Act "operates to displace the states' freedom to structure integral operations in numerous areas of traditional functions" (J.S. App. 18a) and therefore invades the powers reserved to the states by the Tenth Amendment.

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[18] In addition, Section 515(c) establishes a separate variance procedure applicable in cases in which an operator extracts coal, not by cutting into the side of a mountain, but by removing and leveling the mountain top.

For a general description of surface mining methods and terminology, see H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 76-80, 97-105 (1977).

The district court's decision misapplies *National League of Cities;* the Surface Mining Act regulates only coal mine operators, not states. Unlike the mandatory application of federal minimum-wage legislation to state employees, which the Court disapproved in *National League of Cities*, the steep-slope mining requirements of Sections 515(d) and (e) are directed solely at private activities and do not seek to regulate the "States as States." See 426 U.S. at 845. As this Court emphasized in *National League of Cities* (426 U.S. at 840), the Tenth Amendment does not restrict Congress' power under the Commerce Clause to regulate nongovernmental activities.

> Congressional power over areas of private endeavor, even when its exercise may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 262 (1964).[19]

The district court unsuccessfully attempted to avoid the reasoning of *National League of Cities* by stating that, "[w]hile the act ultimately affects the coal mine

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[19] The Ninth Circuit has recently followed these principles in *United States* v. *Helsley*, 615 F.2d 784 (1979), sustaining the federal Airborne Hunting Act against a Tenth Amendment attack. The court held that the challenged statute "regulates private conduct, not the functions of a state acting in its political capacity. The federal act does not impair state sovereignty in any aspect which is reserved exclusively to the states. * * * A state's control over its resources, including wildlife, does not prohibit the proper exercise of federal power under provisions such as the commerce clause." *Id.* at 787-788 (citation omitted).

operator, its pervasive effect is on the states' legislative authority and on state control of land within its boundaries" (J.S. App. 32a). But the Act does not compel the states to enforce the steep-slope standards or to expend any state funds. The states are encouraged to enforce the Act's provisions, but there is no statutory requirement that they enforce any particular standard or that they pursue any regulatory measures at all. The states are not required to participate in any manner whatever. If they do not wish to submit a proposed permanent program that complies with the Surface Mining Act and the accompanying regulations promulgated by the Secretary, they need not do so. In that event, the full regulatory burden will be borne by the federal government.

Moreover, the regulation of surface coal mining is not the kind of "integral governmental function" protected by the Tenth Amendment. The Court in *National League of Cities* faulted the mandatory application of federal minimum-wage legislation to state employees on the ground that it would "significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." 426 U.S. at 851. The Court observed that "[t]hese activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services" (*ibid.*). The problem with the federal minimum-wage law, in the Court's view, was that it would "withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest" and thus would threaten the states' "separate and independent existence" (*ibid.*).

The Surface Mining Act poses none of these difficulties. The regulation of surface coal mining is not an integral governmental function like the providing of police services or other basic public services traditionally associated with state or local governments. Regulation of surface coal mining by the federal government does not in any sense threaten the states' "separate and independent existence." It does not intrude on the states' relationship with their own employees. Rather, the regulation of surface coal mining involves only the regulation of "individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside." 426 U.S. at 845. In this enterprise, Congress is empowered to preempt state law without infringing the Tenth Amendment. *Id.* at 840.[20]

The federal courts have uniformly sustained federal laws, passed in the exercise of powers delegated to Congress under Article I of the Constitution, that leave to the states the choice whether and to what extent to participate in a federal regulatory scheme. See, *e.g.*, *Friends of the Earth* v. *Carey*, 552 F.2d 25, 36-39 (2d Cir.), cert. denied, 434 U.S. 902 (1977); *Sierra Club* v. *EPA*, 540 F. 2d 1114, 1140 (D.C. Cir. 1976), cert. denied, 430 U.S. 959 (1977). Indeed, statutes establishing programs of cooperative federalism, such as the Surface Mining Act and the

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[20] Indeed, in his concurring opinion in *National League of Cities*, Mr. Justice Blackmun expressly recognized that the Court's decision "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426 U.S. at 856.

Clean Air Act (at issue in *Friends of the Earth*), leave the states with substantially more flexibility with respect to the subject matter involved than do other federal laws that this Court has already sustained against Tenth Amendment challenges.

For example, in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978), the Court summarily rejected appellees' argument that the Price-Anderson Act's limitation on liability arising from a nuclear accident violated the Tenth Amendment because it encroached on "the right of the state to protect its own property and its interest in protecting the lives and dwellings of its inhabitants * * *." 77-262 Appellees' Br. 35. The Court disposed of this contention in a footnote, saying that "[n]othing in *National League of Cities* or in our prior due process cases provides any support for this claim" (438 U.S. at 84 n.27). The Court reached this result notwithstanding the Price-Anderson Act's virtually complete preemption of state tort law as far as nuclear accidents are concerned.

Similarly, in *United States* v. *California*, 297 U.S. 175 (1936), the Court rebuffed a constitutional attack on the federal Safety Appliance Act as applied to a state-owned and operated railroad. The continuing validity of the *California* decision was recently reaffirmed in *National League of Cities*, where the Court stated that "California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad" (426 U.S. at 854 n.18). Unlike the situation in *California*, the state in the

present case is not directly regulated by the federal statute at issue. The Commonwealth of Virginia presses its Tenth Amendment arguments, not as a surface mine operator subject to federal regulation, but as another regulator of surface mining whose regulations have been in part preempted by federal law. As long as the Act of Congress involved is within the powers delegated to the Legislative Branch by Article I of the Constitution, there is no Tenth Amendment violation in such circumstances.

The foregoing reasoning and precedents are not affected by the district court's characterization of Sections 515(d) and (e) as land-use measures (J.S. App. 34a-39a). The primary purpose of the steep-slope mining requirements is protection of the environment and the public health and safety. See, *e.g.*, H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 80, 120 (1977); S. Rep. No. 95-128, 95th Cong., 1st Sess. 50-51 (1977).[21] Any land-use consequences are alto-

[21] In passing the Surface Mining Act, Congress was motivated in part by the perceived inadequacies of existing state regulatory programs. The Senate Report stated that "[w]hile many States already do have laws regulating surface coal mining operations, in many instances these laws are inadequate, or are not fully enforced. Most existing State laws and Federal regulations for surface mining and reclamation are inadequate in that they are tailored to suit ongoing mining practices, rather than requiring modification of mining practices to meet established environmental standards." S. Rep. No. 95-128, *supra*, at 51-52. See also Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect*, 81 W. Va. L. Rev. 553 (1979), in which Representative Udall, the chief sponsor of the Surface Mining Act and Chairman of the House Committee on Interior and Insular Affairs, recalled the Committee's finding that "the legitimate and irresistable [sic] urge on the part of a state to protect its coal industry from competitive disadvantage, vis-a-vis coal producers in other states, usually overwhelmed most state legislatures' desire to impose sound

gether incidental, especially since the challenged subsections have as their goal the return of land to approximately the same condition as existed before mining began. Once reclamation of the mined land is complete, the Commonwealth of Virginia and other states remain free to exercise their full powers over the restored land. Moreover, the reclamation requirements imposed by the Act are not absolute. The variance procedures in Section 515 add flexibility to the "approximate original contour" rule and ensure that, in appropriate circumstances and with adequate environmental safeguards, mine operators and land owners will be permitted to create usable flat land on steep slopes, if that is needed for an "equal or better economic or public use" after mining is completed. The impact of the Act on land-use decisions will thus be no greater than necessary to achieve the Act's legitimate environmental and public safety goals.

The remaining justification asserted by the district court for its Tenth Amendment ruling is that the steep-slope mining requirements will cause serious harm to Virginia's economy and will result in "destruction of the taxing power of certain counties, cities, and towns" (J.S. App. 40a). This conclusion is based primarily on the district court's erroneous premise that compliance with the steep-slope requirements is "economically infeasible and physically impossible" (*id.* at 37a). Congress has made contrary findings as to the practicability of Sections 515(d) and (e), and those findings are amply supported by the evidence in the legislative record as well as the

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reclamation laws. Well motivated people on the state level did what they could, but without federal standards political reality militates in favor of loose controls" (*id.* at 553; footnotes omitted).

evidence presented at the trial in this case. See pages 43-47 and note 29, *infra*.

The district court's contrary "findings" as to the effects of the steep-slope mining requirements on the Commonwealth's economy are speculative and not supported by the evidence. They are certainly insufficient to outweigh the voluminous legislative record developed through weeks of hearings, committee meetings, and floor debate spread over a nine-year period. See the Appendix, *infra*. For example, the district court found that "there is a great need for level land in the seven counties that comprise the coal fields of Virginia" and that the "approximate original contour" requirement would prevent the creation of such land and would thereby retard economic growth in southwestern Virginia (J.S. App. 36a-37a). The evidence actually showed, however, that there are today substantial amounts of flat bench land in southwestern Virginia, that most of these flat bench lands are not presently being used for industrial, commercial, or residential purposes, and that in most instances mine benches or other level lands resulting from surface mining will not be suitable for future development.[22]

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[22] In particular, an infrared aerial photograph of the coal-producing area of southwestern Virginia (Def. Exh. 42; Tr. 1718, 1719) showed that, although substantial amounts of unreclaimed bench land have undergone mountaintop removal near the population centers of Norton and Wise, Virginia, no construction activity has begun on these sites except in the area of the Norton, Virginia, shopping center (Tr. 1717-1718, 1729-1730, 2493-2495, 2497).

Ralph R. Widner, a regional development expert and former chairman of the Appalachian Regional Commission, testified that most of the flat bench lands in Appalachia are unsuitable for significant development because of insufficient space for roads, utilities, and other facilities (Tr. 2821-2824). He also stated that flat bench lands have a very low utility for agricultural development (Tr. 2826). Finally, Mr. Widner testi-

In any event, even assuming that the Act's requirements will have a measurable impact on the economy

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fied that there are already more flat bench lands in Appalachia than will ever be developed (Tr. 2826). (Two different sets of pages in the trial transcript are numbered 2821 through 2830. All references here are to the first such set of pages.)

Contrary to the district court's purported "findings" (J.S. App. 38a), the record contains no convincing evidence that any significant number of coal companies in Virginia have gone out of business as a result of the Surface Mining Act's steep-slope mining requirements. Dr. Richard Newcomb, an expert in the field of mineral economics, testified that the coal industry is normally cyclical in nature due to a number of different market factors and that at the time of trial the coal industry was in a short-term slump due to an oversupply of coal (Tr. 1230-1233). According to Dr. Newcomb, the resulting decline in market prices causes decreasing employment and the exiting of marginal operators from the industry, either on a permanent or temporary basis (Tr. 1233, 1238-1239, 1245-1246). In his opinion, the Surface Mining Act will have a minimal economic impact on the coal mining industry and any such impacts on the surface coal mining industry in Virginia will be much smaller than the impact of traditional market factors (Tr. 1250).

The district court's finding that Virginia coal companies have gone out of business as a result of the Act is apparently based in large part on the testimony of Danny R. Brown, Deputy Commissioner of the Virginia Division of Mined Land Reclamation. Mr. Brown testified that, since February 3, 1978 (the effective date of the Act's interim regulatory program), 24 Virginia coal mining operations have ceased because of the federal law (Tr. 2714, 2720). This testimony was based on a summary of a survey (Commonwealth Exh. 13; Tr. 2714-2715, 2720) conducted by Virginia state mine inspectors. The probative value of this survey is highly dubious, however. Mr. Brown testified that he did not know what questions had been asked in the survey (Tr. 2715, 2718-2719), that he did not know how the survey respondents had been chosen (Tr. 2739), that the survey was taken strictly for purposes of this litigation (Tr. 2716), that the survey did not indicate which provisions of the Surface Mining Act had supposedly

of the Commonwealth, this kind of effect, standing alone, is insufficient to establish a Tenth Amendment violation. In *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534-535 (1941), this Court rejected the theory that an adverse impact on state and local economies and tax revenues is a barrier to Congress' exercise of its power under the Commerce Clause. In *National League of Cities*, the Court discussed the possible economic impacts of the statute involved (426 U.S. at 846-847) but made clear that the determinative factor was the nature of the federal action and its displacement of integral state functions, not its economic effect. *Id.* at 847.[23]

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caused mine operations to cease (Tr. 2739-2740), and that the survey did not even show that any mining companies had actually gone out of business—only that particular mining operations, *i.e.*, operations under particular permit numbers, had ceased for some reason (Tr. 2736-2738).

Furthermore, the district court's finding (J.S. App. 38a) that employment in Virginia decreased because of the steep-slope mining requirements is unsupported. In fact, Fred W. Walker, Director of the Virginia Department of Conservation and Economic Development, testified that employment in the Virginia coal industry has continued to grow since enactment of the Surface Mining Act (Tr. 80). Although B.V. Cooper, President of the Virginia Surface Mining and Reclamation Association, claimed that his organization had documented 500 lay-offs in the Virginia surface mining industry since the Act went into effect (Pr. Tr. 36-37), he also admitted that there had been a slump in the coal market for the past few months and that the vitality of surface mining operations was cyclical (Pr. Tr. 53-54). ("Pr. Tr." refers to the transcript of the preliminary hearing in February 1979.)

[23] Two other federal district courts have already rejected Tenth Amendment challenges to the Surface Mining Act. See *Star Coal Co.* v. *Andrus*, Civ. No. 79-171-2 (S.D. Iowa Feb. 13, 1980) (failure to demonstrate probability of success on merits), appeal pending on other grounds, No. 80-49; *Concerned Citizens of Appalachia, Inc.* v. *Andrus*, 494 F. Supp. 679 (E.D. Tenn. 1980), appeal pending, No. 80-1448

III

SECTIONS 515(d) AND (e) AND SECTION 522 OF THE SURFACE MINING ACT DO NOT VIOLATE THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT

A. The district court ruled that Sections 515(d) and (e) of the Surface Mining Act take private property without just compensation, because restoration of steep-slope surface mines to their approximate original contour is "economically and physically impossible," and therefore the statutory "approximate original contour" requirement renders coal mining "physically and economically impossible" (J.S. App. 44a-45a). In addition, the court held that, even if steep-slope surface mines could be restored to their approximate original contour, the value of the mined land after such restoration would be "diminished to practically nothing" (*id.* at 45a). The district court similarly decided that Section 522 of the Act effects an unconstitutional taking, because Sections 522(e)(4) and (5) expressly prohibit surface mining in certain locations and thus "clearly prevent[] a per-

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(6th Cir.). See also *Holmes Limestone Co.* v. *Andrus*, Civ. No. C80-933A (N.D. Ohio Oct. 7, 1980), appeal pending, No. 80-3666 (6th Cir.) (holding that individual mine operator lacks standing to assert Tenth Amendment rights of the State of Ohio).

The only other case in which a Tenth Amendment objection to the Surface Mining Act has been sustained is *Indiana* v. *Andrus*, Civ. Nos. IP 78-500-C and IP 78-501-C (S.D. Ind. June 10, 1980), appeal pending, No. 80-231. The Secretary believes that the Tenth Amendment aspects of the district court's decision in *Indiana* are erroneous for the same reasons that the district court's Tenth Amendment ruling in the present case is incorrect.

son from mining his own land or having it mined" (*id.* at 56a).[24]

The district court explained its Fifth Amendment ruling in the following terms (J.S. App. 53a-54a):

> There are those in every generation who believe that private property should be taken without compensation whenever it is for the public good as conceived by them. This generation is no exception and exponents of this belief fill the halls of Congress and the bureaucracy and infiltrate the courts. The right of a person to own land and the protection of that right were sacred tenets of the common law; and it is no less sacred today as the population booms. We are aware that God only created so much land; that each parcel is considered unique; therefore, as the desire for land increases and the parcels of ownership become smaller and smaller the importance of the Fifth Amendment increases rather than diminishes.

B. The district court's holding that Sections 515 (d) and (e) and Section 522 take private property without just compensation suffers from a fatal threshold deficiency. Neither plaintiffs nor the district court identified any particular piece of property in which

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[24] Because the district court objected only to provisions contained in Section 522(e), it is unclear why the court's order (J.S. App. 19a) declares all of Section 522 unconstitutional. This aspect of the court's order is especially puzzling because Sections 522(a)-(d) do not become applicable to state and private land until the permanent phase of the Act's regulatory program. These provisions, which establish procedures for designating particular lands as unsuitable for some or all surface mining, have not been applied to plaintiffs or any other private landowners in Virginia. Accordingly, no justiciable case or controversy exists with respect to Sections 522(a)-(d). *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-91 (1947).

plaintiffs have an interest that has allegedly been taken by operation of the statute. The district court reached its decision under the Just Compensation Clause without reference to particular tracts of land or the extent of diminution in the value of such tracts attributable to the Act. By proceeding in this manner, the court ignored this Court's oft-repeated injunction that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. See, *e.g.*, *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588 (1972); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-575, 584 (1947). As the Court explained in *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945) (citations omitted):

> It has long been [this Court's] considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied.

The Court's insistence that constitutional issues be raised in a specific factual context is particularly appropriate when allegations of a taking of private property in violation of the Just Compensation Clause are involved. Only last Term, this Court stressed the need to evaluate claims of government takings on the basis of individualized findings regarding all relevant economic factors.

> [T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by

> the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance.

Kaiser Aetna v. *United States*, 444 U.S. 164, 175 (1979) (citations omitted). In the absence of such an "ad hoc, factual inquiry," there is no reason to conclude that the Act will always effect a taking of private property, or, indeed, that it will ever do so. The taking questions presented by plaintiffs to the district court were therefore not ripe for judicial determination.

At a minimum, because of the abstract fashion in which plaintiffs' taking claim was raised, the proper scope of the district court's review was quite limited. The only question properly before the court was whether the "mere enactment" of the Surface Mining Act constitutes a taking. *Agins* v. *Tiburon*, No. 79-602 (June 10, 1980), slip op. 4. Plaintiffs cannot legitimately complain about the way in which the Act has been or will be applied in particular circumstances, because they have not availed themselves of the opportunities provided by the statute to obtain administrative relief from the "approximate original contour" requirement in Section 515(d) or the surface mining restrictions in Section 522(e). If plaintiffs had attempted to obtain a variance under Sections 515(c) or (e) or a waiver under Section 522 (e), a mutually agreeable accommodation might have been reached with respect to individual properties, and constitutional questions might have been avoided. The potential for such administrative solutions under the Surface Mining Act helps to demonstrate why

Fifth Amendment taking claims ordinarily should not be adjudicated in the absence of a full factual record focusing on specified parcels of private property.

C. In any event, the district court's holding that the mere enactment of Title V effects an uncompensated taking of property is incorrect. The court's purported "finding" that compliance with the "approximate original contour" requirement of Section 515(d) is "economically and physically impossible" (J.S. App. 37a-38a, 44a) completely ignores Congress' explicit findings that restoration of steep-slope mines to their approximate original contour is feasible and economically practical. See, *e.g.*, H.R. Rep. No. 95-218, *supra*, at 80, 120-124; S. Rep. No. 93-402, 93d Cong., 1st Sess. 43-45 (1973). After careful consideration of the available evidence, Congress concluded not only that such restoration is physically and economically achievable, but also that it was already being accomplished in several Appalachian states.[25] H.R. Rep. No. 95-218, *supra*, at 97, 123-124; S. Rep. No. 93-402, *supra*, at 44-45. A colloquy on the floor of the House shortly before the vote to accept the conference report on the bill that became the Surface Mining Act is instructive in this regard. Representative Wampler of Virginia raised many of the same objections to the proposed legislation that plaintiffs now urge in this litigation.[26] He stated (123 Cong. Rec. 24426 (1977)):

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[25] We particularly invite the Court's attention to pages 98-100 of the House Report. These pages contain photographs of surface mining sites on steep slopes that have been successfully returned to approximate original contour. The results shown belie the district court's assertion that such restoration is physically impossible.

[26] Representative Wampler testified as a witness for plaintiffs in the district court (Tr. 2452-2528).

> The prohibition of spoil on the downslope, and the prohibition against any exposed highwall after reclamation are sufficient in themselves to severely curtail, if not completely eliminate the surface mining industry in the Appalachian area, notably the small operators who produce the majority of the percentage of surface coal mined.

Representative Murphy of Pennsylvania responded (*ibid.*):

> Mr. Speaker, I would like to allay the fears of my colleagues from Idaho, from Virginia, and from some of the other States who are in opposition to this conference report.
>
> From 1961 through 1963, when I was a young member of the Pennsylvania Legislature, I heard many of these arguments. I live in a coal area; I live in a part of Appalachia; I live in the mountains.
>
> I want to tell the Members that there is more coal being stripped in western Pennsylvania today than at any other time in the history of the State of Pennsylvania. That includes the free-wheeling days of strip mining in the 1940's when they used the excuse of winning World War II to desecrate many sections of Pennsylvania, Ohio, and West Virginia.
>
> This mining today is being conducted by large and small operators. It is being conducted at a profit. The land is being backfilled to the high wall; it is backfilled to contour. We have no more high wall in Pennsylvania. I invite the Members to come and see our reclaimed areas in Pennsylvania today.
>
> The only thing that is causing us a problem is a result of strip mining operations of past years. The reclaiming of these stripped lands costs millions and millions of Pennsylvania tax-

> payer dollars that are needed to reclaim our land. That we are doing.
>
> But today strip mining in Pennsylvania is regulated, and yet it is more profitable than ever, and coal is more plentiful than ever.

Representative Regula of Ohio gave a similar answer to the Act's opponents (*id.* at 24426-24427):

> I think we tend to overlook the fact that in establishing uniform rules for the national development of our coal reserves we are going to encourage greater production. People will now know what kind of equipment to buy, and they will know what kind of operations to develop. The establishment of the rules embodied in this legislation, with the uncertainty that will be removed by the signing of it, is very vital to the increased production of coal.
>
> As the gentleman from Pennsylvania (Mr. Murphy) pointed out, there were arguments against regulation in Pennsylvania, and I heard all the same arguments in the Ohio Legislature some years ago when we developed a bill that is very similar to what we are passing today. Yet when one drives through Ohio today, we find that we do have increased mining, and that the land is being restored to a useful purpose. Certainly the Ohio results have been gratifying, and I am confident that this bill will be achieving the same results at the national level.

The foregoing exchange is typical of the debate that characterized the entire legislative consideration of the Surface Mining Act. It is illustrative of the kind of arguments that are made on virtually every occasion that Congress contemplates a major piece of regulatory legislation. Here, however, in part because of the vigorous political battle waged by congressional advocates for both sides, the legislative investigation of surface mining techniques and recla-

mation methods was unusually thorough in both breadth and depth. The legislative findings regarding the feasibility of the steep-slope mining requirements were based on consideration of technical studies and extensive congressional hearings as well as actual on-site visits by congressional committee members. See, *e.g.*, H.R. Rep. No. 95-218, *supra*, at 97; Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect*, 81 W. Va. L. Rev. 553, 554, 557 (1979);[27] Council on Environmental Quality, *Coal Surface Mining and Reclamation: An Environmental and Economic Assessment of Alternatives* 27-30, 42 (1973) (hereafter "CEQ Report").[28] See generally the voluminous legislative history summarized in the Appendix, *infra*. For example, relying specifically on a recent study of steep-slope surface mining in Eastern Kentucky, Congress concluded that

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[27] Representative Udall described the process that resulted in passage of the Surface Mining Act in the following terms (Udall, *supra*, 81 W. Va. L. Rev. at 554):

> * * * a legislative endeavor involving 183 days of hearings and legislative consideration, eighteen days of House action, three House-Senate Conferences and Reports, eleven Committee Reports, two Presidential vetoes, approximately fifty-two recorded votes in the House and Senate, and the machinations (and statesmen-like conduct) of three Presidents * * *.

[28] The CEQ Report summarized its findings on the economic feasibility of surface mine reclamation in the following way (CEQ Report at 30; footnote omitted):

> In summary, for the model operations evaluated, the costs of advanced reclamation techniques are small compared to the market value of the coal, e.g., only 3 to 9 percent of the price of the coal at the mine. In fact, since coal can be produced by surface mining in Appalachia for $0.75 to $2.50 per ton less than by underground mining, the competitive position of surface mined coal would not deteriorate even at the highest range of reclamation costs.

"[t]he study and recommendations fully support the position that the requirement of regrading of mountain mining sites to approximate original contour and limitations on dumping spoil downslope are necessary, workable, and should not result in any significant reduction of coal supply." H.R. Rep. No. 95-218, *supra*, at 122-123.

The district court erred by failing to accord any deference to these specific legislative findings regarding the feasibility of the steep-slope mining requirements. The court disregarded the well-established principle that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality * * *." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). See also *Duke Power Co.* v. *Carolina Environmental Study Group, supra*, 438 U.S. at 83-84. One who attacks the factual basis of a legislative enactment bears the heavy burden of showing that there is no rational factual basis that can support the legislation. *Katzenbach* v. *McClung, supra*, 379 U.S. at 303-304; *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 594 (1939); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-154 (1938); *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 37-38 (1923). Where the evidence before Congress is merely conflicting, a court may not reweigh the evidence and substitute its judgment for that of the legislature. *Kleppe* v. *New Mexico*, 426 U.S. 529, 541 n.10 (1976). As this Court said more than 40 years ago in *Carolene Products* (304 U.S. at 152-154):

> Even in the absence of [legislative findings or committee reports,] the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it

> is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. * * *
>
> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry * * *. But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. * * * [N]either the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

The district court ignored these salutary precepts of judicial review and, on the basis of a 13-day trial, overturned the product of several years of legislative deliberation. As the case comes to this Court, the question is not whether the district court's purported "findings" are clearly erroneous, but whether Congress rationally could have reached different factual conclusions and been impelled thereby to enact the Surface Mining Act. The legislative record leaves no doubt that the Act and, in particular the "approximate original contour" requirement in Section 515(d), is a rational congressional response to the severe environmental and health and safety problems created by steep-slope surface mining.[29]

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[29] Even when evaluated solely on the basis of the trial record, the district court's findings are not supported by the weight of the evidence. The Secretary presented substantial evidence that it is both physically possible and economically practical for steep-slope surface mine operators to restore mined land to its approximate original contour (Tr. 977-978, 1158, 1168-1169, 1171, 1217, 1788-1789, 1807-1808), to cover

The district court's assertion that "compliance with [the Act's] provisions has a higher potential for

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the highwalls of mining cuts (Tr. 1159, 1161-1162, 1164, 1796, 1807, 1812-1813), and to avoid the dumping of spoil on the downslope (Tr. 1058, 1088-1092, 1158, 1165, 1168-1172, 1806).

In particular, Ronald D. Hill, an expert on surface mining reclamation and water pollution, testified that the statutory standards could be achieved by use of the so-called "block cut" or "haulback" method of surface mining (Tr. 1094-1095, 1098-1099, 1169-1171, 1196-1197). See also H.R. Rep. No. 95-218, *supra*, at 123. This method involves removing the "first cut" of overburden from the mining area, taking it to a planned disposal area, and then backfilling each successive cut into the pit area left by each preceding cut as the operation continues around the mountain contour (Tr. 1094-1095). The method eliminates the necessity of casting the overburden or spoil on the downslope beneath the mining cuts (Tr. 1094, 1098-1099). Mr. Hill testified that the method reduces water pollution and erosion (Tr. 1098, 1170-1171) and is already used extensively for steep-slope mining operations in West Virginia, Pennsylvania, and Kentucky (Tr. 1099). He also testified that the same techniques could be applied on steep slopes in Virginia (Tr. 1158, 1213-1215).

Dr. David R. Maneval, an expert on mineral engineering and surface mining reclamation, testified that in his opinion the Act's steep-slope mining requirements were reasonable and could be met by surface miners in Virginia (Tr. 1002). Dr. Maneval also testified that a 1976 study by the Library of Congress had concluded that under the Act the costs of reclamation would constitute only about six percent of the price of coal at that time (Tr. 1027-1028).

Dr. Richard Newcomb, an expert in mineral economics, testified that the Act's requirements should not pose serious economic problems for surface miners in Virginia (Tr. 1250) and that the Act is in fact likely to benefit small operators by inducing them to undertake better planning and make decisions based on more complete information (Tr. 1256).

Finally, Billy R. Loughry, a surface mine operator from Pennsylvania, testified that he had successfully used the block cut method on steep slopes in Pennsylvania and had successfully met state requirements virtually identical to the

environmental harm than alternative procedures" (J.S. App. 39a) is but another example of the court's willingness to substitute its own judgment for that of Congress. Reasonable persons might well disagree about the safest or most desirable method for reclaiming surface-mined land, but Congress has determined that restoration to approximate original contour is the general approach that should be followed, and that determination is not irrational.[30] The legislative record contains substantial evidence of the environmental benefits to be derived from regrading mined land to its approximate original contour, and Congress could properly rely on such evidence. See, *e.g.*, CEQ Report, at 18-23, 31-32, 83-84. By reweighing the evidence and concluding that "a return to approximate original contour on steep slopes is environmentally unsound" (J.S. App. 55a-56a n.16), the district court exceeded the judicial province. As the court itself acknowledged (*id.* at 56a n.16), its

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federal statute's steep-slope mining requirements (Tr. 1788-1790, 1799, 1806-1807).

[30] Indeed, even one of the two studies cited by the district court (J.S. App. 39a n.11) in support of its view that an alternative approach would be preferable concludes that the "block cut" mining method—which is the principal method for satisfying the "approximate original contour" requirement (see note 29, *supra*)—creates a lower potential for environmental harm than other traditional mining methods. See *Erosion and Sediment Control, Surface Mining in Eastern U.S.*, prepared under contract for the Environmental Protection Agency (Oct. 1976), Commonwealth Exh. 9, vol. I, at 13, 80 (Tr. 721). The study found that

> certain mining methods such as the block cut method, mountain top removal, and area mining generally have, from the standpoint of soil loss potential, an advantage over other methods because less land is usually disturbed. It has been demonstrated that, when mining on a steep slope, erosion and sedimentation are directly proportional to the amount of land disturbed.

disagreement with the legislative judgment concerning the probable environmental effects of surface mine reclamation was the decisive factor that "tip[ped] the balance toward finding a taking." The court's invalidation of the "approximate original contour" requirement was thus directly attributable to its improper usurpation of the legislative role. Duly enacted statutory provisions should not be overturned on such grounds.

D. Apart from the district court's error in reweighing the evidence regarding the likely practical consequences of the Surface Mining Act, the court's ruling under the Just Compensation Clause suffers from another serious flaw: it departs substantially from this Court's precedents concerning the showing necessary to establish a taking of private property within the meaning of the Fifth Amendment. The district court held that the reclamation requirements in Section 515(d) take property, because mined steep-slope land restored to its approximate original contour would be worth much less than it would "if it were left leveled or stabilized with benches" (J.S. App. 45a).[31] Similarly, the court held that Section

[31] The court's factual basis for this holding is dubious at best. The court stated that steep-slope land restored to approximate original contour is worth between $5 and $75 per acre, whereas if it were left leveled or stabilized with benches, it would be worth between $5,000 and $300,000 per acre (J.S. App. 37a, 45a). The court's statistics are apparently based on a combination of parts of different witnesses' testimony. Plaintiff Charles Lowry, a local real estate developer, testified (Tr. 843-844) that he owned land on which surface mining was in progress and that he believed the land was worth no more than $75 per acre before mining began and would be worth between $3,000 and $5,000 per acre after mining if it were not restored to its approximate original contour. The figure of $300,000 per acre is apparently derived from the testimony of Michael J. Quilien, vice-president of a surface mining company, who stated as a matter of

522(e)'s prohibitions on surface mining in certain locations take property, because they are "clearly a physical restriction against the removal of coal" (*id.* at 57a). Both of these rulings do not comport with established standards for determining when government regulation rises to the level of a taking.

In the first place, the district court's decision wholly ignores the relevance of the variance procedures in Sections 515(c) and (e) and the waiver provisions in Section 522(e) to the taking question. The entire purpose of Sections 515(c) and (e) is to permit departures from the "approximate original contour" requirement when such exceptions are necessary to achieve "an equal or better economic or public use." Likewise, the waiver provisions in Section 522(e) are intended to permit surface mining, even in otherwise restricted locations, where there is reason to believe that mining operations can be conducted without a significant threat to the environment or to public health and safety.[32] With respect to the "approximate

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"personal knowledge" that one-half acre of land in Norton, Virginia, which had been surface mined and leveled under the mountaintop removal method, was sold for $150,000 for use as a restaurant site (Tr. 701). However, on cross-examination, Mr. Quillen admitted that mountaintop removal is a permissible surface mining method under the Act and that such a post-mining use would have been approved under the Act as long as the criteria of Section 515(c) had been satisfied (Tr. 754-755).

The court's assertion concerning the enormous value of surface-mined land that is left leveled or stabilized with benches is inconsistent with the extensive evidence at trial showing that the development potential of most surface-mined land in Virginia is limited, unless the land is located near a major highway. See note 22, *supra*.

[32] See also Section 711 of the Act, 30 U.S.C. (Supp. I) 1301, authorizing the Secretary to permit departures, "on an experimental basis" in individual cases, from the environ-

original contour" requirement, the district court also disregarded the fact that, once reclamation is completed, the landowner is free to alter the land's contour in any way that he wishes. The reclamation requirement therefore does not forestall any manner of commercial or residential development.

An error more fundamental than the district court's overlooking of the Act's waiver and variance provisions is its failure to consider systematically the factors identified by this Court as relevant to the question whether regulatory legislation effects a taking of property within the meaning of the Fifth Amendment. Although the Court has candidly acknowledged its inability "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government" (*Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978)), the Court has ordinarily sought to resolve such matters by reference to a number of factors falling into two general categories: "the character of the governmental action" and "[t]he economic impact of the regulation" (*ibid.*).

The character of the governmental action is assessed by looking at the nature of the interference with property. Where an interference can be characterized as a physical invasion by government (see, *e.g.*, *United States* v. *Causby*, 328 U.S. 256 (1946)), or as an acquisition of assets by the government acting in its entrepreneurial capacity, it is more vulnerable to constitutional attack. *Penn Central*, *supra*,

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mental protection performance standards promulgated under Section 515. The Secretary is authorized to approve such experiments "[i]n order to encourage advances in mining and reclamation practices or to allow post-mining land use for industrial, commercial, residential, or public use (including recreational facilities) * * *."

438 U.S. at 124, 128, 135. On the other hand, a taking should rarely be found where the interference arises "from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124. See *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-596 (1962).

Evaluation of the economic impact of the restriction on property necessarily requires consideration of the "bundle of rights" that together constitute property: "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979). See *Goldblatt*, *supra*, 369 U.S. at 592. Mere diminution in the value of property does not effect a taking. *Penn Central*, *supra*, 438 U.S. at 131; *Goldblatt*, *supra*, 369 U.S. at 594; *Hadacheck* v. *Sebastian*, 239 U.S. 394, 408 (1915).

Once it has been established that a regulation serves a substantial public purpose (as the Surface Mining Act indisputably does), the only open question under the Fifth Amendment is whether the regulation prevents all beneficial uses of the property. Neither the reclamation requirement in Section 515(d) nor the surface mining restrictions in Section 522(e) preclude every use of plaintiffs' property. Indeed, the provisions do not preclude coal mining, or even surface coal mining, except in certain narrowly circumscribed locations near roads, schools, churches, parks, public buildings, and cemeteries. In connection with this group of locations, the Act's restrictions are expressly made subject to "valid existing rights" and do not apply to "surface coal mining operations * * * which exist on the [date of enactment]" (30 U.S.C. (Supp. I) 1272(e)). Moreover, the restrictions do not apply to underground mining unless such mining has significant surface effects. Outside the specified areas, the

Act merely imposes performance standards that must be met by mine operators who wish to employ surface mining methods on steep slopes.[33] That is not enough to effect a taking of private property.

Even if the Surface Mining Act were more restrictive, this Court's decisions suggest that a governmental body may prohibit noxious uses of property, without regard to the owner's residual ability *vel non* profitably to exploit the property in other ways. Thus, although Justice Rehnquist, joined by the Chief Justice and Justice Stevens, would have found the Landmarks Preservation Law at issue in *Penn Central* to be a taking, he accepted the unqualified proposition that "the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use." 438 U.S. at 144 (Rehnquist, J., dissenting). In support of this statement, Mr. Justice Rehnquist relied on *Mugler* v. *Kansas*, 123 U.S. 623 (1887), in which the Court upheld a state law absolutely prohibiting the operation of a brewery. The Court there explained (*id.* at 668-669):

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legis-

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[33] Nearly 80% of Virginia's coal can be mined by underground methods. See United States Department of the Interior Federal Coal Management Program, *Final Environmental Statement*, Table 2-2 (1979), relying on a 1977 Bureau of Mines Survey entitled *Demonstrated Coal Reserve Base of the United States as of January 1, 1976*. Accordingly, many steep-slope mine operators can avoid the "approximate original contour" requirement by employing a different mining technique.

> lation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

The approach reflected in *Mugler* has been followed in a long line of decisions in which the Court has sustained governmental regulations designed to prevent noxious uses of property and to protect the public health and safety. *Goldblatt* v. *Town of Hempstead, supra; Miller* v. *Schoene*, 276 U.S. 272 (1928); *Pierce Oil Corp.* v. *City of Hope*, 248 U.S. 498 (1919); *Hadacheck* v. *Sebastian, supra; Reinman* v. *City of Little Rock*, 237 U.S. 171 (1915); see also *Moore* v. *City of East Cleveland*, 431 U.S. 494, 513 (1977) (Stevens, J., concurring) (basic right to use property "has always been limited by the law of nuisance"). It follows from these cases that, in reviewing congressional efforts to protect the environment and the public from the deleterious effects of

surface mining, a court would not even need to consider the remaining beneficial uses to which affected property may be put, except in the context of an inquiry whether the statute enacted was an arbitrarily and unnecessarily harsh means of achieving the legislative purpose.[34]

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[34] This proposition and the cases cited in the text are not inconsistent with this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), which states the general rule that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. *Mahon* involved a private injunctive suit by the owners of the surface rights in certain property. Although the plaintiffs had purchased the surface estate subject to the defendant-grantor's reservation of subsurface mining rights, the plaintiffs sought to prevent such mining by invoking a state law that forbade the removal of coal where it would cause the subsidence of a dwelling. The Court invalidated the state law, emphasizing that only a "single private house" would be affected by the proposed mining activity. *Id.* at 413. The Court appeared to be strongly influenced by the fact that the plaintiffs had purchased the property subject to an express reservation of subsurface mining rights and had waived all right to recover damages that might arise from the mining of coal. In these circumstances, the Court was unwilling to permit plaintiffs to rely on a subsequently enacted state law as a means of abrogating their bargain.

The Court's opinion did not disagree in principle with Justice Brandeis' assertions in dissent that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking" and that a "[r]estriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put." 260 U.S. at 417-418. The Court simply was unwilling to apply these general rules, at the instance of private parties hoping to be excused from their bargain, to sustain a state law apparently more concerned with adjusting private legal rights than with protecting any broader public interest.

Here, of course, substantial beneficial uses remain possible. Surface mining is the only activity regulated by the Act, and plaintiffs have shown at most that compliance with the performance standards in Section 515 may somewhat increase the costs of extracting coal on steep slopes. Such increased costs, like other incidental costs resulting from government regulation, are merely expenses of doing business and are not compensable under the Fifth Amendment. See, *e.g.*, *Omnia Co.* v. *United States*, 261 U.S. 502, 509-510 (1923). Similarly, even accepting the district court's "finding" that mined land restored to its approximate original contour is worth less than unreclaimed land, no taking is established. After the completion of mining, land is left in approximately the same condition as before mining began, and in the meantime the owner has gained the benefits to be derived from the extracted coal.[35]

E. Finally, although the provisions of the Surface Mining Act do not on their face take property within the meaning of the Fifth Amendment, there remains at least the theoretical possibility that as applied to particular parcels of land, the Act and the Secretary's regulations would effect a taking. That situation is not presented here. Even if it were, however, the statute would not necessarily be unconstitutional. The Fifth Amendment does not prohibit the taking of private property by the federal government for a public use; it requires only that, if private property is

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[35] Three other federal district courts have rejected arguments that various provisions of the Surface Mining Act effect unconstitutional takings of property. See the *Star Coal*, *Holmes Limestone*, and *Concerned Citizens of Appalachia* cases, all cited in note 23, *supra*. The district court in *Indiana* v. *Andrus*, also cited in note 23, *supra*, is the only other federal court to sustain a Just Compensation Clause challenge to any of the Act's regulatory measures.

taken for such a purpose, "just compensation" must be paid.

The Tucker Act, 28 U.S.C. 1491, is a general jurisdictional grant to the Court of Claims "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, * * * or for liquidated or unliquidated damages in cases not sounding in tort." Nothing in the language or the legislative history of the Surface Mining Act evidences a specific congressional intent to make Tucker Act suits unavailable to persons aggrieved by the regulation of surface mining. To be sure, the Tucker Act has never been used as a basis for recovering compensation for property "taken" through the operation of a regulatory measure enacted by Congress. One may doubt whether the jurisdictional grant in the Tucker Act was ever intended to cover taking claims arising from regulatory legislation, wherein, by hypothesis, Congress has decided to define property rights rather than to acquire them.[36] See *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1010 (Ct. Cl. 1967). See also *Mosca* v. *United States*, 417 F.2d 1382, 1386 (Ct. Cl. 1969). Be that as it may, however, a judicial declaration that a federal statute is unconstitutional and an injunction against its enforcement are serious matters, and such equitable relief ordinarily should not be granted until plaintiffs have established that their legal remedies are inadequate. If compensation is available under the Tucker Act, then whatever takings may be effected by the Surface Mining Act with respect to

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[36] The legislative history of the Surface Mining Act indicates that Congress included the "valid existing rights" exception in Section 522(e) to avoid any potential problems under the Just Compensation Clause of the Fifth Amendment. See 123 Cong. Rec. 12878 (1977) (remarks of Rep. Roncalio and Rep. Udall).

particular properties do not violate the Fifth Amendment. See, *e.g.*, *Duke Power Co.* v. *Carolina Environmental Study Group, supra,* 438 U.S. at 94 n.39; *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 126-127 (1974); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949).

Accordingly, if in the future any of the plaintiffs in the present case or any other surface coal mine operators believe that the Secretary's application of the Surface Mining Act (including its waiver and variance provisions) to specific parcels of land effects a taking of property, they may seek compensation under the Tucker Act before pursuing their equitable remedies in federal district court. If the Court of Claims determines that a taking has occurred (or if it pretermits the taking question) and then decides that the Tucker Act jurisdiction does not extend to claims for compensation arising from regulatory legislation (as opposed to claims arising from physical invasions of property or exercises of the eminent domain power), then an action in district court for declaratory and injunctive relief will be appropriate.

IV

THE ENFORCEMENT PROVISIONS OF THE SURFACE MINING ACT AUTHORIZING THE ISSUANCE OF SUMMARY CESSATION ORDERS AND THE IMPOSITION OF CIVIL PENALTIES DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. Section 521(a)(2) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1271(a)(2), directs the Secretary immediately to order cessation of a surface mining operation whenever he determines, on the basis of a federal inspection, that the operation is in violation of the Act or a permit condition required by the Act and that it

> creates an imminent danger to the health or safety of the public, or is causing, or can reason-

> ably be expected to cause significant, imminent environmental harm to land, air, or water resources * * *.[37]

A mine operator aggrieved by a summary cessation order issued under Section 521(a)(2) or by a cessation order issued after a notice of violation and expiration of an abatement period under Section 521(a)(3) may immediately seek temporary relief from the Secretary, and the Secretary must act on such a request within five days of its receipt. Section 525(c), 30 U.S.C. (Supp. I) 1275(c). If the Secretary denies temporary relief, that action is subject to judicial review under Section 526(c) of the Act, 30 U.S.C. (Supp. I) 1276(c). In addition, cessation orders are subject to informal administrative review under Section 521(a)(5) and formal administrative review, including an adjudicatory hearing, under Section 525(b).[38] The Secretary's decision in the formal review proceeding is subject to judicial review under Section 526(a)(2).

The district court held (J.S. App. 65a-66a, 73a) that the issuance of summary cessation orders under Section 521(a)(2) violates the Due Process Clause, because the statute does not provide sufficiently ob-

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[37] In situations where the Secretary determines that a violation of the Act or of a permit condition does not entail such a serious threat, Section 521(a)(3) directs him to issue a notice of violation fixing a reasonable time for abatement. If, at the expiration of that period, the violation has not been abated, Section 521(a)(3) directs the Secretary immediately to order cessation of the offending mining operation or the offending portion thereof.

[38] Section 521(a)(5) of the Act provides that any cessation order shall automatically expire within 30 days, "unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of public hearing."

jective criteria for summary administrative action. In addition, the court ruled that due process requires the Secretary to respond within 24 hours to a mine operator's request for temporary relief from a summary cessation order and that the five-day period prescribed by Section 525(c) is unconstitutional (*id.* at 73a).

The district court's decision was both premature and incorrect. Plaintiffs did not allege that they, or any one of them, received a summary cessation order under Section 521(a)(2) or suffered loss as a result. Nor was any such showing of harm made at trial. Accordingly, plaintiffs have not been injured by the cessation order procedure, and the district court should not have considered their objections to it. The adequacy of enforcement devices established by Congress should not be determined in the absence of a concrete case or controversy. The question of what process is due in a given situation depends in large measure on the particular circumstances involved. For example, the propriety of a summary cessation order will inevitably vary with the gravity of the threat posed by particular surface mining practices and conditions. Without some allegation and showing that the parties challenging the Act's provisions have actually suffered injury attributable to those provisions, a reviewing court should not disturb the enforcement scheme designed by Congress. In any event, the provisions invalidated by the district court are not constitutionally defective.

The issuance of immediate cessation orders authorized by Section 521(a)(2) fits comfortably within the lengthy line of precedents holding that due process does not always require a prior hearing. This Court has frequently recognized that, in extraordinary and emergency situations, summary administrative action may be justified. See, *e.g.*, *Calero-Toledo* v. *Pearson*

Yacht Leasing Co., 416 U.S. 663, 677-680 (1974); *Boddie* v. *Connecticut*, 401 U.S. 371, 378-379 (1971); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950); *Fahey* v. *Mallonee*, 332 U.S. 245, 253-254 (1947); *Yakus* v. *United States*, 321 U.S. 414, 442-443 (1944), and cases there cited; *Bowles* v. *Willingham*, 321 U.S. 503, 519-521 (1944); *Phillips* v. *Commissioner*, 283 U.S. 589, 595-599 (1931); *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306, 315-321 (1908); *Lawton* v. *Steele*, 152 U.S. 133, 140-142 (1894). See also *Mackey* v. *Montrym*, 443 U.S. 1, 17 (1979), and *id.* at 21 n.1 (Stewart, J., dissenting).

The district court cited no authority for its holding that Section 521(a)(2) does not provide sufficiently objective criteria for the issuance of cessation orders without a prior hearing. The decision appears to have been based on a conviction that some mine operators have sustained economic harm as the result of summary cessation orders subsequently overturned on administrative appeal. But the possibility of administrative error inheres in any regulatory system; statutory programs authorizing emergency administrative action prior to a hearing are no exception. As this Court explained in *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*, 339 U.S. at 599:

> Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.

The relevant inquiry is not whether a summary cessation order should have been issued in a particular case but whether the statutory procedure itself is

incapable of affording due process. *Yakus* v. *United States*, *supra*, 321 U.S. at 434-435.

Congress was acutely aware of the devastating damage that mining disasters may cause,[39] and it designed the summary cessation order procedure to strike a reasonable balance between the legitimate desire of mining companies to be heard before submitting to administrative regulation and the overriding governmental interest in protecting the public and the environment from dangerous conditions. The standards for issuance of immediate cessation orders under Section 521(a)(2)[40] are quite similar to the

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[39] The legislative history of Section 521(a)(2) of the Surface Mining Act shows that Congress regarded the Secretary's power to issue immediate cessation orders as "critical" and that the measure was primarily intended to avert the possible occurrence of such disasters as the "Buffalo Creek flood." H.R. Rep. No. 95-218, *supra*, at 129-130. The Buffalo Creek flood resulted from the sudden collapse of a coal mine waste impoundment dam in 1972 near Buffalo Creek, West Virginia. The flood killed 124 persons and left 4,000 persons homeless. See H.R. Rep. No. 94-1445, 94th Cong., 2d Sess. 19 (1976).

[40] Section 701(8) of the Act, 30 U.S.C. (Supp. I) 1291(8), defines "imminent danger to the health and safety of the public" as follows:

> the existence of any condition or practice, or any violation of a permit or other requirement of this chapter in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement.

See also 30 C.F.R. 701.5, 44 Fed. Reg. 15319, 15320 (1979) (permanent regulation defining both "imminent danger" to

criteria provided by Congress in other instances where statutory provisions allowing summary administrative action have been upheld against due process challenges. See, *e.g.*, *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*, 339 U.S. at 595 ("dangerous to health * * * or would be in a material respect misleading to the injury or damage of the purchaser or consumer"); *Fahey* v. *Mallonee*, *supra*, 332 U.S. at 250-251 n.1 ("is unsafe or unfit to manage a Federal savings and loan association" or "[i]s in imminent danger of becoming impaired"); *Air East, Inc.* v. *National Transportation Safety Board*, 512 F.2d 1227, 1232 (3d Cir.), cert. denied, 423 U.S. 863 (1975) ("emergency requiring immediate action * * * in respect to air safety in commerce").

Perhaps most pertinent to the present case is *Sink* v. *Morton*, 529 F.2d 601 (4th Cir. 1975), which rejected a mine operator's due process attack on the constitutionality of summary enforcement provisions in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 814.[41] Section 814(c) of the Mine Safety Act permitted a federal inspector to order the immediate withdrawal of all persons from a mine at which he found two or more unwarranted violations of mandatory health or safety standards, at least one of which "could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *." The inspector was not required to find that a violation could cause "imminent dan-

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the public health and safety and "significant, imminent environmental harm").

[41] The Act was substantially amended by the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290. See 30 U.S.C. (Supp. I) 814.

ger." [42] The court of appeals held that the issuance of withdrawal orders without a prior hearing did not violate the Due Process Clause. The district court in the present case ignored the Fourth Circuit's decision in *Sink*, despite the Secretary's express reliance on that precedent.[43]

By requiring more "objective" standards for the issuance of summary cessation orders, the district court improperly substituted its personal views for the considered congressional judgment that "inspectors are in the best position to recognize and control compliance problems." S. Rep. No. 95-128, *supra*, at 90. See *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*, 339 U.S. at 600. As the Senate Committee emphasized (*id.* at 91), individual on-site determinations are indispensable because "neither the Congress nor any

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[42] Section 814(c) has been redesignated as Section 814(d). 30 U.S.C. (Supp. I) 814(d).

Section 814(a), as enacted in 1969, provided for the summary issuance of an order requiring the immediate withdrawal of all persons from a coal mine in which a federal inspector found an "imminent danger." As amended by the Federal Mine Safety and Health Act of 1977, Section 814(a) no longer provides for "imminent danger" withdrawals. 30 U.S.C. (Supp. I) 814(a). That authority is now contained in Section 817(a). The subsection was not at issue in *Sink*.

[43] The district court also explicitly rejected the holding in *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1319-1322 (D. D.C. 1978), aff'd in part, rev'd in part on other grounds, 627 F.2d 1346 (D.C. Cir. 1980), sustaining Section 521(a)(2) of the Surface Mining Act and the Secretary's implementing regulation against a due process challenge identical to that involved here. See also *Star Coal Co.* v. *Andrus*, Civ. No. 79-171-2 (S.D. Iowa Feb. 13, 1980), slip op. 17-18 (upholding Section 521(a)(2) against due process attack), appeal pending on other grounds, No. 80-49; *Anderson & Anderson Contractors, Inc.* v. *Latimer*, 257 S.E. 2d 878 (W. Va. 1979) (upholding a similar provision in the West Virginia statute regulating surface coal mining).

regulatory authority can totally predict the public and environmental hazards arising from such a complex endeavor as surface coal mining * * *." If the approach adopted by the district court were followed, Congress would be faced with the impossible task of describing in detailed (and perhaps quantifiable) terms every conceivable situation in which an imminent threat to the public health or safety or to the environment might arise. The Due Process Clause imposes no such requirement. See *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

The district court's reduction of the statutorily-prescribed time period for the Secretary's response to requests for temporary relief is likewise an unsupportable substitution of a judicial policy preference for that of Congress. Plaintiffs did not demonstrate that the five-day reply period affected them adversely in a particular case or is generally unreasonable. Nor did they introduce evidence tending to show that a shorter reply period is administratively feasible. The district court record simply provides no basis for the conclusion that the five-day reply period allowed by Section 525(c) offends the requirements of due process.

B. As they did with the summary cessation order provisions in Section 521(a)(2) of the Act, plaintiffs challenged the civil penalty provisions in Section 518 without any allegation or showing that they had been affected or harmed by the statutory procedures for the assessment and collection of penalties. For the reasons already stated (see page 62, *supra*), therefore, this aspect of their due process attack was also premature.

Furthermore, the district court's ruling that the Act's civil penalty provisions violate the Due Process Clause because civil penalties will be assessed by the Secretary prior to a hearing (J.S. App. 68a, 74a) appears to be based on a misunderstanding of the

statute. No penalties are finally imposed under Section 518 until the alleged offender has been provided an opportunity for a hearing. Section 518(b) leaves no room for doubt on this point: "A civil penalty shall be assessed by the Secretary only after the person charged with a violation * * * has been given an opportunity for a public hearing."

Although final assessment of a civil penalty cannot occur until an opportunity for a hearing has been provided, Section 518(c) directs the Secretary, within 30 days of a notice of violation or a cessation order, to inform the mine operator of the proposed amount of the civil penalty to be assessed. Section 518(c) further requires that, if the operator "wishes to contest either the amount of the penalty or the fact of the violation," he must "forward the proposed amount to the Secretary for placement in an escrow account." If, after administrative or judicial review, it is determined that no violation occurred or that the proposed penalty should be reduced, the appropriate amount is promptly returned to the operator with interest.

Moreover, under the regulations promulgated by the Secretary (43 C.F.R. 4.1100 *et seq.*), the statutory scheme is even less burdensome on mine operators than the unexplicated language of Section 518 might suggest. The Secretary has construed the Act to include two separate authorizations for administrative review: one for civil penalties in Section 518 and one for notices of violation and cessation orders in Section 525. Although Section 518(c) may seem to require payment of proposed penalties into escrow as a condition of any administrative review of the alleged violation on which the proposed assessment is based, the Secretary has construed and applied the Act to permit a hearing on the fact of the violation under Section 525, without regard to Section 518's prepay-

ment requirement.[44] The review available under Section 518 differs from that available under Section 525 only in that hearings requested under the latter provision may not concern the *amount* of the proposed penalty assessment.[45] Accordingly, if a mine operator wishes to contest the amount of a proposed penalty as well as the fact of the underlying violation, it must seek review under Section 518, and prepayment of the penalty into an escrow account is a precondition of that review. In addition, however, under the Secretary's regulations, even the amount of the penalty may be reviewed and altered on the basis of an informal conference that must be held at the mine operator's request before any payment into an escrow account is required. See 30 C.F.R. 723.17, 42 Fed. Reg. 62703-62704 (1977).

The district court appears to have confused the actual assessment of a civil penalty, *i.e.*, the entry of a final administrative order, with the Secretary's initial notice to the operator of the amount of the proposed

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[44] The correctness of the Secretary's construction and application of Sections 518 and 525 is not at issue in this litigation, because plaintiffs can only benefit from the interpretation adopted by the Secretary.

[45] A procedural difference between the two forms of administrative review is that Section 525 review ordinarily must be requested earlier. Review under Section 525 must be requested within 30 days of the issuance of the notice of violation or cessation order being challenged. 30 U.S.C. (Supp. I) 1275(a). On the other hand, Section 518 allows the Secretary 30 days after the issuance of a notice of violation or cessation order in which to issue a proposed penalty assessment based on that notice or order. After the issuance of the proposed penalty assessment, the mine operator has 30 additional days in which to seek review under Section 518. If timely applications for administrative review are made under both Section 518 and Section 525, the Secretary normally consolidates the administrative hearings into one proceeding.

penalty. See J.S. App. 67a-68a & n.20. In fact, the operator invariably has an opportunity to be heard, even before the temporary deprivation involved in payment of a proposed penalty.

Especially as applied by the Secretary in conjunction with the administrative review provisions in Section 525, the civil penalty provisions in Section 518 do not violate due process. Even if Section 518 were construed to require proposed penalties to be placed in escrow before a mine operator could obtain any hearing at all on the fact of violation or the amount of the penalty, it would not deny plaintiffs due process of law. The Senate Committee Report explains that the prepayment requirement was included in Section 518(c) in order to "avoid the problem of non-collection of fines." S. Rep. No. 95-128, *supra*, at 59. The provision is a reasonable solution designed to eliminate the difficulty identified by Congress without imposing significant burdens on mine operators. In the absence of some particularized showing that the statute creates unfair hardship in a given set of circumstances, there is no reason to believe that a mine operator will be harmed by the statutory procedure. The "refund-with-interest" provision in Section 518(c) ensures that operators who prevail on administrative or judicial review will suffer no financial injury.

As Mr. Justice White wrote in *Arnett* v. *Kennedy*, 416 U.S. 134, 187 (1974) (concurring and dissenting opinion), "[i]n passing upon claims to a hearing before preliminary but nonfinal deprivations, the usual rule of this Court has been that a full hearing at some time suffices." See *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*; *Phillips* v. *Commissioner*, *supra*; *North American Cold Storage Co.* v. *City of Chicago*, *supra*; *Scottish Union and National Insurance Co.* v. *Bowland*, 196 U.S. 611, 631-632 (1905); *Springer* v.

United States, 102 U.S. 586, 593-594 (1881); *Sink* v. *Morton*, *supra*, 529 F.2d at 604 ("Due process does not command that the right to a hearing be held at any particular point during the administrative proceedings; it is satisfied if that right is given at some point during those proceedings").[46] The civil penalty provisions of the Surface Mining Act therefore do not violate the Due Process Clause.

CONCLUSION

To the extent the judgment of the district court rejects plaintiffs' Commerce Clause challenge to Title V of the Surface Mining Act, it should be affirmed. In all other respects now before the Court, the judgment should be reversed.

Respectfully submitted.

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NOVEMBER 1980

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[46] But see *Star Coal Co.* v. *Andrus*, *supra*, slip op. 18-19 (concluding that there is a substantial likelihood that the escrow requirement in Section 518(c) violates due process). The district court in *Indiana* v. *Andrus*, cited in note 23, *supra*, also held that Section 518 violates the Due Process Clause. Like the district court's decision here, the *Indiana* decision suffers from a lack of appreciation of the way in which the Secretary administers the Act as a whole and from legal errors regarding the requisite timing of an administrative hearing under the Due Process Clause.

APPENDIX

The Surface Mining Act was passed and signed into law only after the most thorough legislative consideration. A brief summary of the legislative history of the Act may be found in Note, 81 W. Va. L. Rev. 775 (1979). The legislative history is also summarized in S. Rep. No. 95-128, 95th Cong., 1st Sess. 59-61 (1977), and in H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 140-141 (1977).

Earlier versions of the Act were passed by Congress in December 1974 and in May 1975. On both occasions, President Ford vetoed the proposed legislation. The first veto was a pocket veto at the close of the 93d Congress. The second veto, shortly after the beginning of the 94th Congress, was sustained by a margin of three votes in the House of Representatives, after heated debate. The vote was 278-143. 121 Cong. Rec. 17982-18008 (1975). Three months earlier, the Senate had passed its version of the bill by a vote of 84-13. *Id.* at 6202. The Senate also agreed to the conference report by an overwhelming majority (*id.* at 12965). It therefore seems likely that the narrow failure to obtain a two-thirds vote to override in the House was the only factor that prevented the Surface Mining Act from becoming law two years sooner than it did. (The version of the Act passed by the 94th Congress differed in several respects from the bill that ultimately became law. See S. Rep. No. 95-128, *supra*, at 60).

Hearings on proposed legislation that led ultimately to the Surface Mining Act began in 1968. *Surface Mining Reclamation: Hearings Before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. (1968). Three years later, additional hearings were held in both the House and the Senate.

Regulation of Strip Mining: Hearings Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971); *Surface Mining: Hearings Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. (1971). The Committees reported bills for consideration by their respective houses, and the House of Representatives passed H.R. 6482 by a vote of 265-75. H.R. Rep. No. 92-1462, 92d Cong., 2d Sess. (1972); S. Rep. No. 92-1162, 92d Cong., 2d Sess. (1972); 118 Cong. Rec. 35031, 35055-35056 (1972). Congress adjourned before the Senate could act on the measure.

Similar bills were reintroduced in the 93d Congress, and further hearings were held. *Regulation of Surface Mining Operations: Hearings Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. (1973); *Regulation of Surface Mining: Hearings Before the Subcomm. on the Environment and the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. (1973). At the request of Senator Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, the Council on Environmental Quality prepared a report entitled *Coal Surface Mining and Reclamation: An Environmental and Economic Assessment of Alternatives* (Comm. Print 1973), and the Senate Committee held additional hearings to consider the report and the reactions it provoked. *Coal Surface Mining and Reclamation: Hearing Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. (1973).

Again, the House and Senate Committees reported bills for consideration by the full House and Senate.

S. Rep. No. 93-402, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 93-1072, 93d Cong., 2d Sess. (1974). The Senate passed S.425 by a vote of 82-8 (119 Cong. Rec. 33333 (1973)), and several months later, the House passed an amended version of the bill, H.R. 11500, by a vote of 291-81 (120 Cong. Rec. 25272-25273, 25294 (1974)). After more than 100 hours of deliberations, the Conference Committee produced its report (H.R. Conf. Rep. No. 93-1522, 93d Cong., 2d Sess. (1974)), and both houses agreed in December 1974. The bill failed to be enacted only because of President Ford's pocket veto.

The process began again with the opening of the 94th Congress in 1975. The surface mining legislation was reintroduced, and in February the Senate Committee held a hearing to permit Administration spokesmen to state the Executive Branch's objections to the bill. *Surface Mining Briefing: Briefing Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. (1975). Both Committees soon reported their bills to the full House and Senate, which again passed the proposed legislation by large majorities. S. Rep. No. 94-28, 94th Cong., 1st Sess. (1975); H.R. Rep. No. 94-45, 94th Cong., 1st Sess. (1975); 121 Cong. Rec. 6202, 7069, 7803 (1975). The conference report was accepted by both houses in May, and this led to President Ford's second veto and the unsuccessful override effort described above. See H.R. Conf. Rep. No. 94-189, 94th Cong., 1st Sess. (1975). Later in the 94th Congress, the House Committee reported two additional pieces of proposed surface mining legislation, but no further action was taken by the full House or Senate until the change of administration. See H.R. Rep. No. 94-896, 94th Cong., 2d Sess. (1976); H.R. Rep. No. 94-1445, 94th Cong., 2d Sess. (1976).

The protracted congressional endeavor finally bore fruit in 1977. The relevant House and Senate Committees held extensive hearings shortly after the opening of the 95th Congress to consider bills introduced at the very beginning of the new legislative session. *Surface Mining Control and Reclamation Act of 1977: Hearings Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 95th Cong., 1st Sess. (1977); *Surface Mining Control and Reclamation Act of 1977: Hearings Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. (1977). The Committees expeditiously reported the legislation to the full houses, and passage in both chambers followed soon afterward. H.R. Rep. No. 95-218, 95th Cong., 1st Sess. (1977); S. Rep. No. 95-128, 95th Cong., 1st Sess. (1977); 123 Cong. Rec. 12887, 15778 (1977). The vote in the House was 241-64 and in the Senate, 58-8. Lengthy floor debate preceded the vote in both houses. *Id.* at 12861-12886, 15691-15754, 15762-15777. The Conference Committee issued its report in July (H.R. Conf. Rep. No. 95-493, 95th Cong., 1st Sess. (1977)), and after further floor debate, both houses agreed to the report, the House by a vote of 325-68, the Senate by a vote of 85-8. 123 Cong. Rec. 23967-23988, 24419-24429 (1977). President Carter signed the Act into law on August 3, 1977.

★ U. S. GOVERNMENT PRINTING OFFICE: 1980 333464 161

Nos. 79-1538 and 79-1596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.,
Appellants,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR

On Appeals From The United States District Court For The Western District of Virginia

BRIEF FOR THE VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., THE TOWN OF WISE VIRGINIA, AND THE COMMONWEALTH OF VIRGINIA

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BRIEF FOR THE VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., THE TOWN OF WISE, VIRGINIA, AND THE COMMONWEALTH OF VIRGINIA

Appellees' Counterstatement

The statement of the case set forth in the Secretary's brief is accurate insofar as it describes the procedural history of this case. It fails, however, to describe the factual background necessary for a full understanding of the case. Appellees believe that the factual summary set forth below will facilitate the Court's consideration of the legal issues presented.

Bituminous coal, which is Virginia's most valuable natural resource, is found in the seven westernmost counties of the State, a region of mountainous terrain with very limited level land area. The topography of much of the region is marked by steep mountain slopes with sharp ridges, massive outcrops of rock, and narrow valleys which severely limit development of the land for any economic use. Because of thin soils and steep terrain these mountain lands in their natural state are not suited for forestry operations or for agricultural use. Their value lies solely in the underlying coal seams which appear as outcroppings at various elevations on the mountain slopes. With few exceptions these coal seams cannot be recovered by underground mining for reasons related to their limited thickness, inadequate roof support provided by the overlying shale strata, and other geologic factors. Accordingly, unless they are removed by surface mining methods these valuable coal reserves, estimated as 300 million tons, are unrecoverable.

Coal mining is the major industrial activity in southwestern Virginia, and provides the economic lifeblood of the communities and people of the region. Because the economy of the region is so heavily

dependent on coal mining it is particularly affected by cyclical changes in the coal market and recurrent periods of unemployment and depression, a problem which has been a major concern of State and local officials for many years. Accordingly, State officials have recognized the urgent need for diversification of industry in order to establish a broader economic base and alternative sources of employment for the citizens of the area in the future, but such diversification is greatly inhibited by the rugged terrain conditions, and especially by the almost total lack of level land areas for industrial development, for housing and transportation facilities, and related support facilities.[1] Accordingly, a very important long range benefit to the communities in Southwestern Virginia is the potential for creating additional areas of level land by post-mining reclamation of surface mined areas. In recent years reclaimed surface mine areas have provided appropriate sites for airports, schools, hospitals, shopping centers, industrial parks and residential housing, and it has been the policy of the State Division of Mined Land Reclamation to encourage continued development of additional level land areas consistent with practical environmental considerations.

For several years prior to enactment of the Federal Surface Mining Act the Commonwealth of Virginia administered and enforced State programs regulating the use of land for surface coal mining. In 1966 the Virginia General Assembly adopted the Virginia Coal Surface Mining Law which required State approval of

[1] See testimony of Governor John N. Dalton, Tr.2798-2800; Fred W. Walker, Director, Department of Conservation and Economic Development, Tr.72-76; Congressman William C. Wampler, Tr.2468-2472.

mining plans and posting of reclamation bonds as a condition of the issuance of permits for surface mining, and in 1972 the law was amended to strengthen inspection and enforcement action by the Division of Mined Land Reclamation.[2]

In 1975 a Technical Committee was appointed to draft regulations designed to incorporate the best available surface mining technology consistent with the terrain and other geophysical conditions existing in Virginia. In developing such regulations the Technical Committee reviewed and appraised the regulations and statutes of other Appalachian coal producing States, as well as various technical engineering studies and reports prepared for federal agencies, including the Environmental Protection Agency. As a result of eighteen months of study the Virginia Reclamation Manual was adopted by the Board of Conservation and Economic Development on May 12, 1977, to become effective on September 1, 1977 as to all surface mining operations initiated after that date. (Testimony of J. Steven Griles, Tr.88-90).

Between the date of the adoption of the Virginia Reclamation Manual and its effective date of September 1, 1977, the Federal Surface Mining Control and Reclamation Act was signed into law on August 3, 1977 to become effective May 3, 1978. Because the Federal Act preempts all State laws and regulations not in conformity with the Act, the Virginia Reclamation Manual was effectively superseded by the Federal Act.[3]

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[2] Chapter 15 of Title 45, Code of Virginia.

[3] Section 504 of the Act directs the Secretary of the Interior to promulgate and enforce a federal program for any State which fails to

(footnote continues)

Although the environmental standards of the Virginia Reclamation Manual substantially parallel those of the Federal Act there is a significant difference in their approach to reclamation problems. The State regulations recognize that there are varying site-specific conditions found at any particular mining operation, and allow State authorities to approve reclamation practices which are best suited to deal with such conditions, whereas the Federal Act imposes inflexible, mandatory criteria to be applied in all situations without exception. The most critical example of this is found in section 515(d) of the Act which calls for returning all steep slope areas to approximate original contour, with all highwalls completely covered.[4] In contrast, the Virginia Reclamation Manual allows the mined area to be restored to a more level contour suitable for a better and more practical use than if restored to its original steep slope contour. This permits regrading and compaction of overburden material on the mining bench with appropriate drainage structures to prevent erosion and sediment runoff. The level area may then be used for cropland, grazing, tree farming and other agricultural uses, or, in more populated areas, for housing facilities and numerous other purposes. If restored to their approximate original contour as required by the Federal Act the steep mountain slopes have no utility for any purposes,

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(footnote continued)

adopt a State program incorporating provisions no less stringent than those contained in the Federal Act, and "[A]ny statutes or regulations of such State which are in effect to regulate surface mining and reclamation operations shall. . .be *preempted and superceded by* the Federal program." §504(g), emphasis added.

[4] The Federal Act defines a steep slope as any slope above twenty degrees. §515(d)(4).

and any economic value the land would otherwise have is virtually destroyed.[5]

The trial evidence established, and the district court found, that ninety-five percent of surface mineable coal in Virginia is situated on steep slope terrain having an average slope angle of 25 degrees. J.S. App. 96a. The Court expressly found on the basis of the extensive trial evidence that compliance with the Act's requirement for returning the steep mountain slopes of Virginia to original contour after surface mining "is economically unfeasible and physically impossible." J.S. App. 37a. The court further concluded from the expert engineering testimony that a return to original contour on steep slopes is environmentally unsound and may cause far greater environmental damage than the alternative procedures called for in the Virginia Reclamation Manual. The court specifically found that:

> "A return to approximate original contour on a steep slope increases sedimentation because of the increased erosion from the unstable mass. In addition a dangerous condition may be created by backfilling the bench. When overburden material is stacked up against the highwall the normal process of settlement of the fill material tends to pull it away from the highwall. This provides a natural channel for water from the upper slope to flow down to the bench below, creating an unstable mass with a likelihood of eventual collapse." J.S. App. 39a.

After synthesizing the cumulative effect of the trial evidence the district court found that because the Federal Act has preempted State regulation of surface

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[5] See, District Court Memorandum Opinion, J.S. App.56a.

mining "the State has lost control over the economic development that could take place in southwest Virginia," and "is now in the position of enforcing an Act so particularly unsuited to its terrain that compliance with its provisions has a higher potential for environmental harm than alternative procedures." J.S. App. 36a, 39a.[6] For these reasons the court concluded that the Act operates to "displace the States' freedom to structure integral operations in areas of traditional governmental functions, *National League of Cities* v. *Usery,* 426 U.S. at 852, and, therefore, is in contravention of the Tenth Amendment." J.S. App. 39a-40a.

The district court further found, on the basis of the trial evidence, that

> "The requirement of return to original contour amounts to a physical restriction on the removal of coal. The landowner cannot remove his coal because it is economically and physically impossible to comply with the steep slope reclamation provisions of the Act. Because of the nature of the land, the owner is thereby deprived of any use of his land, not only the most profitable use. Mountainous terrain is unusable for all income producing activities unless it is level, which the Act is aimed at preventing." J.S. App. 55a, 56a.

The court noted further that "The fact that property owners are being deprived of the use of their land by a statute that does not accomplish its purpose, nay, may even run contrary to it, tips the balance toward finding a taking." Accordingly, the court held

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[6] Citing studies sponsored by federal government agencies, including the EPA and the Bureau of Mines. J.S. App.39a, n.17.

that the Act's requirement that steep slopes be restored to approximate original contour constitutes a taking of property without just compensation in violation of the Fifth Amendment. J.S. App. 56a.

The district court also determined that the provisions of section 521 of the Federal Act which empower federal inspectors to summarily order cessation of mining operations without a prior hearing or showing of proper cause create a grave potential for abuse, and give rise to violations of the procedural due process guarantees of the Fifth Amendment. In support of this conclusion the court cited a number of examples, developed through evidence at the trial, where OSM inspectors issued unjustified and unwarranted cessation orders which were subsequently vacated after formal hearings on grounds that they were improperly issued. During the time such invalid cessation orders remained in effect the mine operators lost thousands of tons of coal, hundreds of miners were out of work, and the operators were compelled to incur great expense in engineering and attorney's fees in appealing the cessation orders.

Similarly, the court held that the civil penalty provisions of section 518 do not accord with due process because they call for mandatory assessment of penalties by the Secretary against a mine operator in amounts up to $150,000 without a hearing of any kind, and provide that unless an operator pays the assessed penalty, prior to any hearing, he waives all

legal rights to contest the alleged violation or penalty amount. J.S. App. 68a, 69a.[7]

In light of these findings the court enjoined the issuance of summary cessation orders under section 521, and civil penalties under section 518, until such time as adequate due process guarantees are afforded to mine operators. J.S. App. 73a, 74a.

SUMMARY OF ARGUMENT

Title V of the Surface Mining Act creates a preemptive program of federal regulatory controls affecting land use and land reclamation, and thrusts the federal government for the first time into a sphere of regulatory activity which has heretofore been regarded as exclusively within the jurisdiction of the States and their political subdivisions. By imposing federal controls upon land use for surface mining, and dictating criteria for reclamation of land areas after mining has ceased, the Act transfers to a federal agency the time-honored land use powers of State and local governments and creates a body of federal police powers designed to supplant the inherent police powers of the States to provide for the protection of the individual citizen in his person as well as in his property rights.

This in turn raises a serious constitutional question as to whether the power granted to Congress under the Commerce Clause extends to regulation of

[7] Section 518(c) provides that if a person wishes to contest either the amount of a penalty or the fact of the alleged violation he must first forward the penalty amount to the Secretary for placement in an escrow account, and "Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."

private non-federal lands within a State. The prior decisions of this Court indicate that it does not, and there are no legal precedents to support exercise of federal powers in this field.

In addition, serious questions are presented as to whether the means selected by Congress in this instance are appropriately designed to achieve the legislative objective of protecting the quality of land resources and preventing environmental damage. The overwhelming weight of the trial evidence supports the district court's finding that the Act's requirement for restoring steep slope mountain terrain to approximate original contour is environmentally unsound, and prevents reclamation of unproductive mountain slope land to a higher level of productive use compatible with the needs of the local communities and their people.

Because it denies to a State the discretionary authority to determine the best and highest use of its lands, and the orderly development of its natural resources, Title V unconstitutionally intrudes upon sovereign powers reserved to the States under the Tenth Amendment. Existing environmental protection programs under the Clean Air Act and the Water Pollution Control Act are fully capable of achieving the desired objectives without the excessive intrusion upon State land use functions brought about by the Surface Mining Act.

The district court correctly held that because the inflexible requirements of Title V as applied to mining on steep mountain terrain amount to a physical restriction on removal of coal, with a consequent destruction of the economic value of the land, the Act effectuates a

taking of property without just compensation in violation of the Fifth Amendment.

The trial court also correctly concluded that summary issuance of cessation orders by federal mine inspectors without a hearing or showing of proper cause, and the issuance of civil penalty assessments under the procedures sanctioned by the Act, result in a denial of procedural due process contrary to the guarantees of the Fifth Amendment.

ARGUMENT

I

BECAUSE TITLE V OF THE FEDERAL ACT PURPORTS TO REGULATE, UNDER THE GUISE OF THE COMMERCE CLAUSE, LAND USE FUNCTIONS WITHIN THE RECOGNIZED SCOPE OF THE POLICE POWERS OF THE COMMONWEALTH OF VIRGINIA, IT INVOLVES AN UNCONSTITUTIONAL ASSUMPTION OF AUTHORITY NOT GRANTED TO THE FEDERAL GOVERNMENT

In considering the question of whether Title V of the Act represents a valid exercise of the powers of Congress under the Commerce Clause the district court concluded that it must defer to the congressional finding in section 101(f) of the Act that surface coal mining has adverse effects on commerce, and that "A court may neither examine the motive or purpose behind the legislation, *United States* v. *Darby,* 312 U.S. 100, 115 (1941), nor substitute its own judgement for that of the Congress."

Appellees acknowledge that the district court correctly stated the rule laid down by this Court in the cited cases, but contend that the rule is not applicable where, as here, the subject of attempted federal regulation is by its very nature beyond the scope of the commerce power. At the heart of this case is the question of whether land *as such* is subject to regulation under the Commerce Clause, i.e. whether land can be regarded as "in commerce." As appellees will show, the principal focus and thrust of the Federal Surface Mining Act is regulation of the use of private non-federal lands within the borders of the respective States, and has little or nothing to do with the commerce aspects of extraction, transportation and sale of surface mined coal. As early as 1972 when the Senate was considering S.630, the Department of the Interior advised its sponsor, Senator Jackson, that "The environmental problems stemming from mining operations are essentially land use problems. Such problems are, under the Federal Constitution, primarily the responsibility of the States." [8] S.425 which was passed in the 93rd Congress was also sponsored by Senator Jackson who commented on the Senate floor that:

> "Surface mining is a form of land use and its regulation and control must be considered within the context of the broad demands and competing requirements upon the State's land resources. In a constitutional sense, the primary authority and responsibility for the control of surface mining resides in the State." [9]

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[8] S.Rept. 92-1162, 92d Cong., 2d Session, p.62.

[9] Cong. Rec. January 18, 1973, p.S.834.

Despite this acknowledgement that the surface mining legislation involved regulation of land use, and that constitutional authority for control of surface mining resides in the States, Congress proceeded to adopt the Act as a comprehensive scheme of federal controls preempting State power to permit land use for surface coal mining in any manner other than as dictated by the federal government.

Although the power of the federal government to adopt and enforce environmental laws dealing with air and water resources [10] has been recognized as a valid exercise of the commerce power, (cf. cases cited *infra*), it does not follow that a parallel case can be made for federal regulation of private land. Air is an element common to all States, and its contamination within a State can have effects beyond that State's borders in what has been termed a "spillover effect." [11] On similar grounds, there is a demonstrable federal interest in the environmental protection of navigable waters and their tributaries. But no comparable grounds exist for the assertion of a federal interest sufficient to justify the regulation of private lands, *as land,* within a State. Hence, in the Surface Mining Act Congress has assumed the authority, without a rational basis under the Commerce Clause, to impose federal environmental standards on private lands so as to restrict their use for surface coal mining.

The Secretary's argument (Brief, p.24) that the regulatory scheme of Title V is primarily concerned

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[10] The Clean Air Act, 42 USC 1857 et seq., The Federal Water Pollution Control Act 33 USC 1251 et seq.

[11] See, *Stewart*, Pyramids of Sacrifice; Problems of Federalism in Mandating State Implementation of National Environmental Policy; 86 Yale Law Journal 1196 (1977).

with "operations involved in extraction of surface mined coal," rather than control of land use, is deceptive and misleading, and is contrary to the express finding of the district court. The court found that the direct regulatory impact of Title V is upon land use, and "While the Act ultimately affects the coal mine operator, its pervasive effect is on the States' legislative authority and on State control of land within its boundaries." J.S. App. 32a.

Although the Secretary now contends that the Act does not regulate land, this contention is directly at odds with the position the Interior Department and its officials have heretofore taken. For example, in *The Land Use Restoration Provisions of the Surface Mining Control and Reclamation Act: Constitutional Considerations*,[12] the Associate Solicitor for the Office of Surface Mining has unabashedly described the Act as establishing land use controls. William M. Eichbaum, in collaboration with David T. Buente, an attorney in the Division of Lands and Natural Resources, Department of Justice, discusses the regulatory scheme of the Act and describes the steps the Office of Surface Mining has taken to implement its "land-use control standards." *Id.* 229. The authors note that in the interim phase OSM established criteria for assessing pre-mining use of the land, which "defined eleven separate 'land-use' categories," *Id.* 229,230, and that "the permanent program includes complex permitting requirements that relate to land-use-control." *Id.* 233. See also, fn. 8, supra.

An examination of Title V proves beyond doubt that its objective is to dictate the conditions under

[12] 4 Harvard Environmental Law Review 227 (1980)

which a State may authorize the use of lands for surface mining, and the procedures and land use criteria which a State must apply in considering and approving applications for permits. §§ 506, 507. Under its terms a State cannot issue a permit for any land use for coal surface mining without first acquiring data on the history of the land use which preceded the proposed mining, the capability of the land prior to mining to support a variety of uses, the productivity of the land prior to mining, the use which is proposed to be made of the land following reclamation, the capacity of the post-mining reclaimed land to support a variety of alternate uses and the relationship of such uses to existing land use policies and plans, the manner in which proposed post-mining land use is to be achieved, and the necessary support activities which may be required to achieve the post-mining land use. § 508. A State must also require a performance bond in an amount sufficient to assure post-mining reclamation of the land to approximate original contour, and assure compliance with proposed post-mining land use. § 509. Other provisions of Title V prohibit surface coal mining on various categories of lands, and require that a State desiring to retain any enforcement authority under the Act must establish a planning process for designating additional land areas as unsuitable for mining in accordance with the specified criteria of the Act. § 522.

After reviewing these preemptive restrictions on the authority of the States to permit use of lands for surface coal mining the district court correctly found that the Act's "pervasive effect is upon the States' legislative authority and on State control of land use within its boundaries." J.S. App. 32a.

A. Diminution of the Utility of Land as a Basis for Federal Commerce Regulation.

The predicate for the regulatory scheme of the Act is contained in the finding in section 101(c) that surface mining affects commerce, *inter alia,* by "diminishing the utility of land for commercial, industrial, residential, recreational, agricultural and forestry purposes . . . ." The overwhelming weight of the trial evidence in this case proves, however, that surface coal mining *enhances* rather than *diminishes* the utility of Virginia's mountain slope land for commercial, industrial, residential, agricultural and forestry purposes. In its Memorandum Opinion the district court enumerated the various purposes for which mined lands have been and can be used when reclaimed to a level state, and the high premium placed on the value of such level lands. If restored to original contour, the court found, mountain slope land has no practical economic value or use. J.S. App.37a.[13]

The Secretary nevertheless insists that the courts must defer to Congress' finding and "the only remaining question for judicial consideration is whether the means selected by Congress for the regulation of commerce are rational." Brief, p.24, citing *Katzenbach* v. *McClung,* 379 U.S. 294 (1964). This argument again sidesteps the real issue of whether regulation of land is regulation of commerce. If Congress has no

[13] The court relied on evidence that steep slope land without coal has only a nominal value of five dollars to seventy-five dollars an acre, but coal lands which are left in a level state after mining are worth a minimum of five thousand dollars an acre, and some reclaimed lands may bring as much as three hundred thousand dollars an acre. The court noted that "If restored to its original contour, its worth reverts to the lower values." Id.

power to regulate non-federal lands within a State it cannot create that power simply by making a finding that the use of such lands adversely affects interstate commerce.

It would seem obvious that the rule of deference to Congressional findings cannot foreclose scrutiny into the premise on which such findings are based. If a finding that diminution of the utility of land is sufficient grounds for exercise of the commerce power in the Surface Mining Act it follows that Congress can bring any and all land use activities within the regulatory control of the federal government by a similar "finding."[14]

Although the Secretary's brief is generously flavored with citations to commerce clause cases ranging from *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824) to *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964), it is important to note that none of the cited cases deal with the question of whether the federal commerce power extends to regulation of non-federal lands within the borders of the individual States.

The actual fact is that this Court has never held, nor even intimated, that land as such is subject to regulation under the Commerce Clause. Indeed, in the relatively few cases in which the issue has been even touched upon the Court unequivocally rejected this notion. As long ago as 1877 the Court noted in

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[14] As one commentator puts it "The Act relies upon what can be called the 'hocus pocus' theory of federal power by incantations in the form of conclusory generalizations of effects upon commerce, as if this magically creates a general federal police power." *Engdahl,* Some Observations on State and Federal Control of Natural Resources, 15 Houston Law Review 1201, 1218.

straightforward language that *"Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade."* *McCready* v. *Virginia,* 94 U.S. 391, 396. Emphasis added. The cases since *McCready* provide no support for any contrary conclusion, and the quoted language from *McCready* continues to be cited by the courts as controlling law. See, e.g., *Moore* v. *Hampton Roads Sanitation Commission,* 577 F.2d 1030, 1038 (4th Cir. 1977).

Although in the intervening years since *McCready* the federal commerce power has been broadly construed to cover local activities affecting commerce, it has never been extended to land use regulation, and the courts have uniformly held that federal powers in respect to regulating land are limited to those derived from the Property Clause of Article 4, Section 3, Clause 2 of the Constitution, i.e. legislative powers over federally owned land.[15] In *Kansas* v. *Colorado,* 206 U.S. 46 (1906), the State of Kansas sought to restrain Colorado from diverting the waters of the Arkansas River for reclamation of arid lands within Colorado. The United States intervened in the action asserting that the right of either Colorado or Kansas to appropriate the waters of the river for reclamation purposes was subject to the superior authority and supervisory control of the United States to control the whole system of reclamation of arid lands. The Court noted that the issue raised by the government's

[15] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States, or of any particular State."

claim"... involves the question whether the reclamation of arid lands is one of the powers granted to the general government," and went on to hold that the only authority of the federal government to deal with reclamation of land derives from the Property Clause, which

> "... does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits....The proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers ... This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment. This Amendment, which was seemingly adopted with prescience of just such a contention as the present, disclosed the widespread fear that the national government might under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted." 206 U.S. at 87-89.

The Court held, accordingly, that the respective rights of the States of Kansas and Colorado were not subordinate to any supposed superior right on the part of the federal government to provide for reclamation of lands, other than federal lands, within the States.

The principles expressed by the Court in *Kansas* v. *Colorado* have been followed in subsequent decisions, and remain the applicable law to the present time. In *United States* v. *Arizona,* 295 U.S. 174

(1935), the Court held that the federal reclamation laws providing for irrigation of arid lands did not involve an exercise of the commerce power, "but in the exertion of power granted by Article 4, section 3, clause 2." 295 U.S. at 184. A similar view was expressed by the Court in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958) involving federal reclamation projects in California.

In *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (1955) the State of Oregon sought to set aside a license issued by the FPC for a power project to use non-navigable waters located on a federal reservation in Oregon. The question presented was whether the State had exclusive control over the use of non-navigable waters within the State. The Court noted that the authority of the FPC to issue licenses in relation to navigable waters springs from the Commerce Clause, and that where non-navigable waters are involved the Commission's authority to issue licenses hinges upon whether the project is located on federally owned lands and reservations. The Court held that since in the case before it the power project, and the non-navigable stream, were located on a federal reservation the FPC had authority under the Property Clause of the Constitution to issue the license. The clear implication of the Court's holding is that had the project been located on private or state owned lands the federal agency would have no regulatory powers respecting it.

Kleppe v. *New Mexico,* 426 U.S. 529 (1976), involved the constitutionality of a statute enacted by Congress in 1971 to protect wild horses and burros on public lands of the United States. The State of New

Mexico asserted that the federal government lacked power to legislate with respect to wild animals unless the animals were moving in interstate commerce or damaging the public lands, and that the State alone had authority in respect to control of these animals. A three-judge federal court agreed with the State that the Act could not be sustained under the Commerce Clause, but upon appeal this Court upheld the Act on grounds that under the Property Clause the federal government has power over its own property analogous to the police power of the several states, and can properly regulate to protect the wildlife living there. At the same time, the Court noted, the Property Clause does not authorize "an exercise of a general control over public policy in a State," but only "an exercise of the complete power which Congress has over particular public property entrusted to it" 426 U.S. at 540, citing *United States* v. *San Francisco,* 310 U.S. 19, 84 L.Ed. 1050 (1940).

The common legal premise in all of the cited cases is that the enumerated powers of the federal government under Article I of the Constitution do not include regulation of lands other than federal lands, and there is no judicial authority or precedent for the Secretary's contention that shipment of extractive minerals in interstate commerce gives rise to federal regulatory powers to dictate to the States how private lands within their jurisdiction may be used.

B. Floods and Water Pollution

The alternative ground upon which the Secretary defends the preemptive scheme of the Act is that Congress found in section 101(c) that surface mining adversely affects commerce by contributing to floods

and water pollution. The apparent rationale for this argument is that because federal commerce jurisdiction includes navigable waters it must also include jurisdiction over any watershed areas from which rainwater runoff flows into navigable waters or their tributaries.[16]

If this premise is carried to its logical conclusion there must be deemed to be a federal commerce interest in every square foot of land which receives rainfall or storm precipitation. In such a context there could be no limits whatever to the federal commerce power, and State control of land use would for all practical purposes be a dead letter.

While it is unquestioned that the federal commerce power extends to maintaining and improving the navigable waters of the United States, and preventing obstructions to navigation, federal jurisdiction over navigable waters does not carry with it the power to regulate lands which drain into navigable waters. "This power to regulate navigation confers upon the United States a dominant servitude which extends to the entire stream and the stream bed below the ordinary high water mark . . . *but does not extend beyond the high water mark.*" *United States* v. *Rands*, 389 U.S. 121, 123 (1967), emphasis added.

Construction of flood control dams and structures is carried out under the Flood Control Act of 1944, 33 USC 701, which expressly states in its Declaration of Policy (section 701-1) that

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[16] The evidence presented at the trial showed that surface coal mining in Virginia has a minimal effect on stream sedimentation, and that mining on steep slopes has the effect of interrupting and holding heavy flows of rainwater which would otherwise increase flooding in the valleys below. See district court Memorandum Opinion, J.S. App.26a, n.1.

> "In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorised, it is hereby declared to be the policy of the Congress to recognize *the interests and rights of the States in determining the development of the watersheds within their borders* and likewise their interests and rights in water utilization and control . . . ." Emphasis added.

In addition to the flood control activities authorized under the Flood Control Act, the Federal Water Pollution Control Act directs the Environmental Protection Agency to establish, in cooperation with the States, programs for reducing or eliminating pollution and improving the sanitary condition of surface and underground waters. These programs deal separately with "point source pollution," i.e. the effluent from any discrete conveyance, pipe, ditch, channel, conduit or any vessel or floating craft, and "non-point source pollution" resulting primarily from rainwater and stormwater runoff of land areas.

In respect to point source pollution, the EPA has authority to establish effluent limitations for discharges into navigable waters, and to authorize the States to issue licenses and permits under the National Pollutant Discharge Elimination System (NPDES) provided for in title IV of the Act. Pursuant to the provisions of such title the Commonwealth of Virginia has established and carried out NPDES programs which have received full approval of the EPA.

Non-point source pollution is dealt with under section 208 of the Federal Water Pollution Control

Act, which calls for the Governor of each State to designate an organization capable of developing effective areawide water management plans for any problem areas. Pursuant to this section the Governor of Virginia in 1974 designated the Southwest Virginia Section 208 Planning Agency to make a comprehensive survey and prepare a study of water control problems in the seven southwestern Virginia counties comprising the coal producing region of the State.[17] Participating in the Study were the Virginia State Water Control Board, the Virginia Department of Conservation and Economic Development, various local governmental agencies, the Virginia Division of Mined Land Reclamation, the U.S. Soil Conservation Service, the Environmental Protection Agency, and various citizens advisory groups.

Based upon the data developed by the Section 208 Planning Agency over a period of four years it was found that agriculture is the major source of pollution and sedimentation of area streams in southwestern Virginia, and that "up to 75 percent of the suspended solids can be eliminated in many large streams by controlling erosion from agricultural lands." Operator's Ex.1, 373. See also, Memorandum Opinion of the district court, J.S. App. 16a, n.1.

From the foregoing discussion two principal points can be drawn. First, the statutes enacted by Congress dealing with exercise of federal regulatory powers over waters of the United States do not purport to give the government jurisdiction over the upland areas comprising the watersheds which drain into

[17] The results of this survey, together with the findings of the Study, were introduced in evidence at the trial as Operator's Exhibit 1.

navigable streams and their tributaries. Second, the federal interest in preventing water pollution has been provided for through various programs and enforcement actions authorized under the Federal Water Pollution Control Act Amendments of 1972 without resorting to the drastic land use regulation scheme of the Federal Surface Mining Act.

II

THE DISTRICT COURT CORRECTLY HELD THAT TITLE V OF THE FEDERAL SURFACE MINING ACT PREEMPTS RESERVED POWERS OF THE STATES IN CONTRAVENTION OF THE TENTH AMENDMENT

Assuming *arguendo* that there exists a federal commerce interest in private land use, the question remains as to whether the commerce power justifies federal preemption of the historic reserved powers of the States in this field, or whether the method of regulation selected by Congress constitutes a "drastic invasion of State sovereignty where less intrusive approaches are available." *District of Columbia* v. *Train,* discussed infra.

A. The Act Displaces Virginia's Freedom to Structure Integral Operations in Areas of Traditional Governmental Functions

As noted in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), "the test in judging whether federal regulation is constitutionally permissible is whether it interferes with a State's *"freedom* to structure *integral operations* in areas of *traditional governmental functions."* 426 U.S. at 852. In establishing

such a test, the Court recognized that "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from expressing the authority in that manner." 426 U.S. at 845. As one author has expressed it: "Expanded use of federal authority to control the environmental consequence of land use decisions is ultimately subject to the limitation upon congressional power posed by the role of the states as sovereign entities within a federal system of government."[18]

These concepts were previously considered in *District of Columbia* v. *Train,* 521 F.2d 971 (1975), vacated and remanded on other grounds, *sub nom EPA* v. *Brown,* 431 U.S. 99. The Commonwealth of Virginia, together with the State of Maryland and the District of Columbia, contended in that case that EPA regulations requiring State and local governments to enforce vehicle exhaust emission standards, and other EPA air quality control requirements under the Clean Air Act, were in violation of the principles of federalism embodied in the Tenth Amendment. The Court of Appeals for the District of Columbia held that although the Clean Air Act was a valid exercise of the power of Congress to regulate interstate commerce, the EPA enforcement activities improperly infringed upon State sovereignty. As stated by the court:

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[18] Note, *Zoning, Environmental Land Use Regulation,* 91 Harvard Law Review 1427, 1610. (1978) [discussing *National League of Cities* v. *Usery, supra*]

> "It would thus appear that the extent of federal intrusion into state sovereignty is of some relevance even where the federal regulations are an exercise of the commerce power. Since the Tenth Amendment was described in *Fry* [*Fry v. United States,* 421 U.S. 542 (1975)] as declaring 'the constitutional policy that Congress may not exercise power *in a fashion* that impairs the States' integrity or their ability to function in a federal system,' the restrictions may be directed to the manner in which the federal government exercises its commerce power. . .A federal regulation which *compels* the states to enforce federal regulatory programs clearly 'impairs the States' integrity' and 'their ability to function in a federal system.' The Tenth Amendment thus provides an additional ground for striking down these particular regulations." 521 F.2d at 994. (emphasis original).

Similarly, in *Brown* v. *EPA,* 521 F.2d 827 (9th Cir. 1975), vacated and remanded for consideration of mootness, 431 U.S. 99 (1977), another case arising under the Clean Air Act and the EPA regulations, the Ninth Circuit Court of Appeals expressed deep concern over a construction of the commerce clause which "would reduce the states to puppets of a ventriloquist Congress." 521 F.2d at 839.

In *Friends of the Earth* v. *Carey,* 552 F.2d 25 (2nd Cir. 1977) the Court of Appeals noted:

> "In determining whether an otherwise valid exercise of the federal commerce power would impermissibly impair state sovereignty we are therefore required to balance the reason for the

> exercise against the extent of the usurpation of state policy-making or invasion of integral state functions that would result, giving 'inappropriate recognition to the legitimate concerns of each government.' " 552 F.2d at 37.

In summary, the Court must balance the interests of federal and state sovereignty in ruling upon the constitutionality of the Act. Under the federal scheme,"neither government may destroy the other nor control in any substantial manner the exercise of its power." *National League of Cities,* 426 at 844, citing *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514 (1926). As discussed below, the Act deprives states of discretionary authority over land use planning and thus impermissibly intrudes upon an integral and traditional function of state government.

1. The Act Impermissibly Removes State Discretionary Authority Over Land Use Planning and Control of Surface Mining

In *Sierra Club* v. *EPA,* 540 F.2d 1114 (D.C. Cir. 1976), cert. den. 430 U.S. 959, the Court of Appeals observed that the Tenth Amendment is not infringed if "the states retain broad discretion under the regulations to control the use of their land in the scope of their economic development." 540 F.2d at 1140.

In the case at hand the district court found that "The evidence presented to this court clearly shows that the Commonwealth of Virginia does not retain broad discretion under the regulatory scheme devised by Congress to control economic development of the land in southwest Virginia, nor does it retain the power to make choices as to essential decisions regarding that land." J.A. App.35a. The court went on to state that:

> "The provision requiring 'return to approximate original contour' for all operations, regardless of the conditions, is the most intrusive practical aspect of the Act ... Virginia is particularly affected by this legislation because ninety-five percent of its strippable reserves are located on slopes in excess of twenty degrees, and, therefore, the approximate original contour provision comes into play with regard to almost all of the state's coal reserves." J.S. App.35a, 36a.

Because there is a great need for level land in southwest Virginia, the court noted, leaving the land in a level state instead of restoring it to approximate original contour would allow it to be used for a variety of purposes important to the economic development of the region. The court accordingly concluded that:

> "In enforcing this requirement the State has lost control over the economic development that could take place in southwest Virginia. The Commonwealth is deprived of its right to dictate whether this land could be better used for some other purpose." J.S. App.36a.

The Secretary argues (Brief pp. 30,31) that *National League of Cities* is not applicable here because the "regulation of surface coal mining is not the kind of 'integral governmental function' protected by the Tenth Amendment."

The district court dealt directly with this contention, and on the basis of the trial record concluded that the Federal Act has a significant impact on integral State functions "[T]hrough forced relinquishment of State control of land use planning; through loss of State control of its economy; and through

economic harm, from destruction of the taxing power of certain counties, cities and towns." Because of this, the court found, "The Act has substantially restructured traditional ways in which the local governments have arranged their affairs." J.S. App.40a; *National League of Cities,* 426 U.S. at 849.

2. The Act Displaces State Policy Regarding Land Use Planning and Control Which Has Traditionally Been A Function Of State And Local Government.

Neither the holding of *National League of Cities* nor the range of "integral" functions can be confined to decisions involving wages and hours of State and municipal employees, or police and fire protection activities of local governments. If this is all that is left of State sovereignty then the Tenth Amendment is indeed a dead letter. The district court more correctly construed State land use regulation as being "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens," citing *National League of Cities,* 426 U.S. at 855, and noted that "A state is its citizens and protection of their land is as vital an activity as any of the other enumerated services." J.S. App. 34a.

For more than 200 years regulation of land use has been exercised exclusively by the States. *City of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365; *Berman* v. *Parker,* 348 U.S. 26 (1954); *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974). As noted by this Court in *Warth* v. *Seldin,* 422 U.S. 490, 508 N.18 (1975), "Zoning laws and their provisions, long considered essential to urban planning, are peculiarly within the

province of the State and local legislative authorities." The federal government has not, prior to this Act, claimed any supervening authority in this area. The Act thus raises a critical question as to whether Congress can effectively amend the Constitution, and accomplish a transfer of these historically reserved State powers to a federal agency in Washington, by the simple expedient of making a legislative finding that use of land for surface coal mining adversely affects interstate commerce.

It seems reasonable to infer that land use regulation is typical of those activities "performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *See National League of Cities,* 426 U.S. at 851.

The Secretary responds to the district court's findings of displacement of integral state functions with the misleading and inaccurate assertion that "[t]he variance procedures in § 515 add flexibility to the 'approximate original contour' rule and ensure that, in appropriate circumstances and with adequate environmental safeguards, mine operators and land owners will be permitted to create usable flat land on steep slopes, if that is needed for an 'equal or better economic or public use' after mining is completed." (Brief p. 35). It is astounding that the Secretary would attempt to mislead the Court in this manner, since the variance language of § 515(e) is conditioned by the proviso that "complete backfilling with spoil material shall be required to cover completely the highwall which material will maintain stability following mining and reclamation."

The district court considered this very point, and noted that the Secretary's own comments published with his proposed regulations admitted that the requirement for completely covering the highwall renders the variance provision of little use on steep slopes. 44 Fed. Reg. 61313, October 4, 1979. The court added that "For all practical purposes, the backfilling stipulation destroys the usefulness of a variance since the highwall must still be covered." J.S. App. 36a, n.9. *See also,* J.S. App. 37a, n.10; J.S. App. 45a.

An identical conclusion has been reached by the board to which the Secretary has delegated his functions of deciding disputes arising under the Act. In *Tollage Creek Elkhorn Mining Co.,* IBSMA 80-32, November 24, 1980, the Interior Board of Surface Mining Appeals considered a notice of violation charging Tollage Creek with failure to restore the land to approximate original contour. The owner of the surface area planned to use the land for a tree farm after mining was completed, and prior to mining obtained a permit from the State of Kentucky allowing a variance for this purpose. Despite the State variance permit the Board upheld the charged violation because the highwall was not completely covered. In so doing, however, the Board noted that

> "It is with difficulty that we have reached the result in this case. Common sense and fairness would appear to require an opposite result. The Federal law seems inescapable, however. Had Congress been presented with the factual situation here, where elimination of the highwall would not benefit the environment but only burden the operator or landowner, it may have provided in the Act for some exception to the rigid

backfilling requirements. Apparently, it was not. Clearly it did not."

In the context of the foregoing discussion it is evident that the Act does constitute a drastic intrusion of federal authority in an area previously considered the exclusive domain of sovereign States. Further even if the Act does not *compel* Virginia to regulate mining by its express terms, the Act clearly displaces existing land use statutes peculiarly applicable to mining in Virginia with national standards proved to be impracticable in application to the State's terrain.

B. Less Intrusive Approaches Are Available for Dealing With The Environmental Effects of Surface Coal Mining

Under the principle established in *Fry* v. *United States,* discussed *ante,* even a drastic invasion of state sovereignty may be constitutional where less intrusive approaches are unavailable. 421 U.S. at 542. In the instant case the Court must continue to employ a balancing approach in determining whether there exist less intrusive measures available to Congress which would produce the same or similar results while preserving the sovereignty of the State in matters of land use control.

As has been seen, there are currently in effect various federal programs for dealing with air and water quality under the Clean Air Act and the Federal Water Pollution Control Act of 1972. The federal regulations adopted under these statutes apply with equal force to the surface coal mining industry as to all other industries. Any atmospheric pollution generated as a result of surface coal mining is subject to all enforcement powers and sanctions administered by

the Environmental Protection Agency under the Clean Air Act. All mining operations, both surface and underground, are currently required to comply with the pollution control programs adopted pursuant to the Federal Water Pollution Control Act. The basic requirement of this latter program is that no effluents may be discharged from any "point source" into streams which ultimately lead into navigable waterways except pursuant to the terms of an NPDES permit. Persons responsible for failure to comply with permit requirements may be fined up to $10,000 per day under EPA administrative procedures, and wilfull violations are subject to criminal provisions authorizing fines of not less than $2,500 and not more than $25,000 per day of violation, and one year of imprisonment for the first offense.[19]

It is thus evident that prior to enactment of the Federal Surface Mining Control and Reclamation Act there were in effect federal and state programs establishing strict environmental safeguards for air and water contamination associated with or incidental to surface coal mining. Appellees submit that these regulatory programs, which are designed to vindicate the federal interest in clean air and water, represent the acceptable limits of federal intrusion upon the historic police powers of the States in the area of public safety and welfare. Because the federal interest can be and has been effectively dealt with under the existing programs, the wholesale preemption of State police powers under the Federal Act constitutes a "drastic

[19] 33 U.S.C. 1319.

invasion of state sovereignty where less intrusive approaches are available." *Train, supra.*[20]

C. The Court Should Balance Competing Federal, State and Private Interests in Construing the Act

Justice Blackmun interpreted *National League of Cities* v. *Usery* to have adopted a "balancing approach" in assessing the constitutionality of a federal act which encroaches upon rights reserved to states under the Tenth Amendment. 426 U.S. at 856. *See also Friends of the Earth* v. *Carey,* 552 F.2d 25, 37 (2d Cir. 1977). In certain areas, such as environmental protection, Justice Blackmun considered the federal interest to be "demonstrably greater" and state facility compliance with imposed federal standards to be essential. 426 U.S. at 856. The present challenge to the Act under the Tenth Amendment cannot be dismissed, however, by simply categorizing it as an "environmental case." That which is regulated under the Act here is not air or water, which may have measurable affects upon the nation as a whole. Rather, it is *land as land* that is subjected to federal control by the Act. The Secretary attempts to avoid the obvious by suggesting that the Act merely regulates surface mining. As previously noted, however, the Act and implementing regulations have been described by the former Associate Solicitor for the Division of Surface Mining as forming "a land-use regulatory scheme that is national, uniform and mandatory." [21]

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[20] Appellees in no way suggest that protection of air and water are beyond the reach of federal regulatory powers. See discussion p. 13 *ante.*

[21] 4 Harv. Envir. L. Rev. at 235; cited at note 12, *ante.*

Viewed in this light, the case cannot be determined by reference to those cases considering congressional enactment of laws "regulating individual business necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside." 426 U.S. at 845. Regulation of mining or mine safety or environmental factors, all of which have been held to be valid exercises of federal power, is not the basic impact of this Act. Rather, the federal government now seeks not merely to regulate but to *plan* for land use in all States and localities.

Under the balancing test the federal interest must be "demonstrably greater" than the interest of the State, and for the reasons stated below it is submitted that federal interest in land use planning *per se* is not demonstrably greater than that of states.

1. Land Is A Unique Commodity Not Readily Susceptible to Uniform, Nationwide Planning or Regulation.

Prior to the Act federal efforts to impose nationwide land resources regulation have, with few exceptions, taken the form of financial incentives to states and localities to implement regulations. *See Note,* 4 Harv. Envir. L. Rev. at 239-40 fn. 68-74. That Congress has not previously sought to impose "nationwide, uniform and mandatory" land use requirements undoubtedly reflects recognition of the uniqueness of each parcel of land. It is hornbook law that land is unique. Land traditionally has been subject to the equity jurisdiction of the courts so as to provide flexibility and avoid harsh results that might obtain if considered under rigid rules of law. IV Pomeroy's *Equity Jurisprudence* § 1402, p. 1034, 2 Story, Equity

Jurisprudence §§ 829-843, 993. Rigid applications of uniform laws or regulations frequently lead to irrational results as evidenced by the trial court's findings.

For instance, a very great part of the trial evidence dealt with the question of whether restoring steep mountain slopes to approximate original contour is an environmentally sound practice. The expert witnesses were in general agreement that the infinite number of variables that may be encountered in the topography, geology and hydrology of mountain areas require individual consideration of the methods to be used in erosion and sediment control, and that no one method can be prescribed as an across-the-board best-technology approach for this purpose. Tr. 2557-2562, 2652-2654, 2667-2702.

According to the great weight of the engineering testimony, restoring slopes to original contour results in a greater amount of disturbed soil being exposed to stormwater precipitation at a steeper angle on the mountainside, and as a result the restored slope is subject to greater erosion, slippage and landslides than is the case where the mining bench area is graded to a more level contour with appropriate drainage and diversion structures, and a portion of the highwall is left. In the latter situation the rainwater runoff from upper slopes is interrupted by the reclaimed mining bench, and because the compacted fill material on the mining bench has a high water retention capacity there is less likelihood of stream sedimentation or flooding from heavy rainfall. Tr. 627-630, 633-634, 1169-1171, 1197, 1834, 2554-2555. Dr. Donald Haney, State Geologist and Director of Geological Research for the Commonwealth of Kentucky, described the experiences encountered on similar terrain

in Eastern Kentucky where the State Highway Department has been trying for 50 years to control steep angle slopes on highway cuts. He stated that the fill material cannot be stabilized, and that continual erosion, slippage and rock falls create a constant maintenance problem. Similar problems have been experienced, he said, in attempting to comply with the approximate original contour requirements of the Act on surface coal mining operations in Eastern Kentucky. In his opinion a far better environmental result is obtained by compacting the fill material on the mining bench to the extent practical, and leaving a portion of the highwall exposed. Tr. 2621-2625. Benjamin C. Green, former Deputy Director of the West Virginia Department of Natural Resources, testified that restoration of original contour creates an impossible situation from an environmental point of view because "if you take the material to the top of the wall, you blend in and complement the surrounding slopes, then you have greatly accelerated the erosion and sediment control problems, you are, of course, duty bound to prevent." Tr. 2544.

On the basis of this and similar testimony the district court reached its finding that the original contour requirement is so particularly unsuited to Virginia's terrain that compliance with its provisions has a higher potential for environmental harm than alternative methods of reclamation. J.S. App. 39a.

The Secretary argues (Brief p.48) that the district court's findings are not supported by the weight of the evidence. For this purpose he selects certain items of trial testimony which supposedly refute the trial court's findings, but which, in fact, do not. In a footnote on

page 48 of his brief the Secretary cites testimony of Ronald Hill to the effect that the statutory standards could be achieved by use of the so-called "block cut" or "haulback" method of surface mining. The district court specifically found, however, that use of this method of surface mining is not feasible in the steep mountain areas of Virginia. J.S. App. 37a, n.10; 43a, n.14. The Secretary further refers to opinion testimony of Dr. David Maneval to the effect that the steep slope requirements could be met in Virginia, but Dr. Maneval admitted that his experience was limited to surface mining in Pennsylvania where coal deposits are found on flat or gently rolling terrain totally unlike that in southwestern Virginia and other portions of central Appalachia. Tr. 1008-1014a.[22] Billy R. Loughry, whose testimony is also cited by the Secretary, agreed that surface mining in Pennsylvania is completely different so far as terrain conditions are concerned, and in his view it would be impossible to comply with the original contour requirement in the steep slope terrain in Virginia. Tr. 1822. Dr. Richard Newcomb, the government's mineral economics expert, whose testimony is also cited in the Secretary's brief, admitted on questioning by the Court that the statistical data he had compiled and discussed in his testimony was entirely theoretical and had little or no bearing on the problems encountered by Virginia surface mine operators under the Federal Act. Tr. 1343-1357.

In any event, the findings of the district court on the basis of the trial evidence should be accorded deference as provided in Rule 52 of the Federal Rules

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[22] Dr. Maneval conceded that no more than six percent of Pennsylvania coal is on slopes of 20 degrees or more, as compared with ninety-five percent in Virginia. Tr. 1008-1010.

of Civil Procedure. As stated in that Rule, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See United States* v. *U.S. Gypsum Co.,* 333 U.S. 364, 393 (1948); *Kelley* v. *Southern Pacific Co.,* 419 U.S. 318 (1974). In the present case there is no basis for concluding that the findings of the district court on the environmental undesirability of restoring steep slopes to original contour are clearly erroneous.

This type of detailed, terrain-specific inquiry is almost invariably necessary when considering land use control. The flaw of the Act, therefore, lies not merely in the breadth of its scope but in the inflexible nature of the rules it imposes. Simply stated, what works in Pennsylvania does not work in Virginia.

In view of the multiplicity of uses to which land may be put, and the peculiarly local factors which may influence any particular use or value, it is difficult to state categorically that a federal interest in land use allocation as contemplated under the Act is "demonstrably greater" than the interests of state and local governments and their citizens who are most immediately affected thereby. Even if, for example, return to original contour would improve the aesthetic value of the land, it does not balance out the economic deprivations imposed upon the affected communities by loss of employment, tax revenues and other benefits derived from surface mining.

2. Land-Use Planning Is A Traditional Service Of State and Local Government And Particularly Within Their Expertise

Over one hundred years ago this Court recognized that use, sale or other disposition of land was of vital concern to the States as States.

> "The title and modes of disposition of real property within a state, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority, for such control would be foreign to the purposes for which the federal government was created, and would seriously embarrass the landed interests of the state." *U.S.* v. *Fox*, 94 U.S. 315 (1876).

Both the Court in *National League of Cities* and the district court recognized that the validity of a Tenth Amendment bar to the exercise of the Commerce Clause by Congress hinges in large part on the degree to which a State, as a state, is affected. 426 U.S. at 875 and J.S. App. at 32a, respectively. As previously discussed, the lower court concluded that

> [W]hile the Act ultimately affects the coal mine operator, its pervasive effect is on the states' legislative authority and on state control of land within its boundaries. J.S. App.32a.

The district court properly ascertained that the Act *regulates* surface mining in order to achieve federal land-use *planning* goals.

Land neither moves in commerce, nor is transportable to other jurisdictions. Land-use planning has substantial effects but they are localized. Decisions about land use, moreover, should be made by those

persons who must live with their decisions, i.e., representatives of municipal, county, or state governments. Land use and planning directly affects the prosperity of their citizens, generation of tax revenues to fund basic governmental services, and the aesthetic values of the immediate environment in which they reside. It is the typical function "essential to separate and independent existence" of a state. *See, National League of Cities,* 426 at 845 *citing Coyle* v. *Oklahoma,* 221 U.S. 559, 580, and *Lane County* v. *Oregon,* 7 Wall. 71 76.

III

SECTIONS 515 AND 522 OF THE SURFACE MINING ACT CONSTITUTE A TAKING OF PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT

The individual plaintiffs in this case include owners of fee interests in coal lands, as well as surface mine operators who have leased mineral rights on mountain slope acreage. The interests of these plaintiffs are tangible interests having substantial economic value. The trial evidence established that in the mountain ridges of Southwest Virginia, coal is usually found in multiple seams separated by "partings" of intervening rock and shale strata. Where these seams are mineable by surface mining methods the amount of recoverable coal per acre foot is approximately 1700 tons and, based on the average thickness of seams, the average tonnage yield per acre is from 8000 to 9000

tons. Pr. Tr. 22-23, 41.[23] At current royalty rates and market prices, the economic value which a fee owner leasing his land to a coal mine operator can derive from his mineral estate interest represents approximately $20,000 an acre. Id., 22,42. The fee owner can, in addition, realize substantial residual value as a result of the increased utility of the land *after* removal of the coal if it is reclaimed to a more level configuration appropriate for agriculture, grazing, silviculture or commerical development. Id., 23-25, Tr. 696-709. In its original state the steep slope land has no productive use for these or other purposes. J.S.App.56a.

Although predictions of profitability are always matters of speculation, the trial evidence established that the residual value of reclaimed surface mined areas after removal of the coal is dependent upon the extent to which it is left in a relatively level state. Other dependent factors include proximity to population centers and accessibility to improved public roads and highways. After careful consideration the trial court accepted as accurate the uncontroverted testimony of real estate experts from the southwestern Virginia area that reclaimed level land adjacent to highways or populated areas may command prices up to or in excess of $100,000 an acre, whereas if reclaimed to its approximate original contour "its value has been diminished to practically nothing," J.S. App.45a, Tr. 696-709, 843-844; Pr.Tr. 20-25, and it has no practical value or use. As the district court aptly observed:

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[23] "Pr.Tr." refers to the transcript of testimony at the preliminary injunction hearing before the district court.

> "This is a case in which the Surface Mining Act must be viewed in a practical sense, for it involves more than just a large diminution of land value, more than commercial impracticality. In Virginia the evidence shows that surface landowners are possessed of small tracts usually less than one-hundred acres. The requirement of return to approximate original contour amounts to a physical restriction on the removal of coal . . . Because of the nature of the land, the owner is thereby deprived of any use of his land, not only the most profitable use." J.S. App.55-56a.

The trial evidence showed that the mining equipment required for a typical surface mining operation in this area involves an investment of between one and one-half to two million dollars. Tr.377-410, 852-869, 875-881. Pr.Tr. 105-111. The additional earth moving necessary to return to original contour, if such were physically possible, would require special equipment investment of a magnitude far beyond the financial capabilities of mine operators typical of those operating on these relatively small tracts.[24]

As a result of the original contour requirements of the Act the stark reality faced by the individual plaintiffs is that no practical use can be made of their property. Far from suffering a mere "diminution" in the value of their property, plaintiffs are deprived outright of any and all reasonable use.

In concluding that the prohibitory effect of Title V effectuates a "taking" of plaintiffs' property the district

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[24] As previously noted, the district court found that return to original contour and completely covering the highwall is for all practical purposes physically impossible of attainment.

court reviewed the principals laid down by this Court in the cases beginning with *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915), *United States* v. *Cress,* 243 U.S. 316 (1917) and *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), through *United States* v. *Causby,* 328 U.S. 256 (1946), *Goldblatt* v. *Hempstead,* 369 U.S. 590 (1962), *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104 (1978), *Andrus* v. *Allard,* 444 U.S. 51 (1979), and *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979).

After a scholarly discussion of "The formulas and factors [which] have been developed in a variety of settings", *Allard, supra,* the district court concluded that

> "In the case now before this court the facts are on all fours with *Pennsylvania Coal Co.* v. *Mahon.* This is not a case involving 'an average reciprocity of advantage,' 260 U.S. at 415, which has been recognized as a justification for zoning and other laws . . . Because of the nature of the land, the owner is deprived of any use of his land, not only the most profitable use." J.S. App.55a.

Appellees believe that the district court properly applied the rule of *Pennsylvania Coal Co.* to the facts of this case. In making the determination that a taking had occurred, the Court in *Pennsylvania Coal* recognized the presumption of general validity which attaches to every legislative enactment, yet, according to Justice Holmes, the exercise of the police powers of the State must have its limits "or the contract and due process clauses are gone." 260 U.S. at 413. In attempting to strike a balance between the government's power to regulate for the public interest and

constitutionally protected property rights, Justice Holmes laid down the broad principle so often reiterated by this Court:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking." Id., at 145.

The continuing force and validity of *Pennsylvania Coal* has been repeatedly acknowledged by this Court. Although there is no case more compellingly apposite to the instant case than *Pennsylvania Coal,* it is indeed curious that the Secretary's brief relegates discussion of its significance to a single footnote which, moreover, attempts to explain the holding in that case as one where the Court was "unwilling to apply general rules at the instance of private parties hoping to be excused from their bargain." Brief, 57, n.34.

The Secretary proceeds to cite *Goldblatt, supra,* for the proposition that "a taking should rarely be found where the interference arises 'from some public program adjusting the benefits and burdens of economic life to promote the common good." Brief, 54. Appellees do not quarrel with this general principle of balancing the benefits and burdens of governmental regulation, but point out that the district court here found no evidence that sections 515(d) and 522 promote the common good, and, in fact, found that their provisions do not accomplish that purpose. J.S. App.55a, n.16.

There is the further fact that an owner of land has a justifiable expectation that any determination as to the permissible use of his land will be made by the

State or local authorities who have exclusively exercised this function in the past, and that he will not be subjected to a massive body of zoning or land use regulations by a completely different governmental entity.[25] It is not unreasonable to assume that many persons who have invested in coal lands with the expectation that they could remove the coal by surface mining methods would not have made such investments had they reason to believe that they would be subjected to a pervasive scheme of land use regulations and controls such as that created by the Federal Act. The landowner plaintiffs in the present case are in substantially that type of situation, where they now find that the federal regulations frustrate their "reasonable investment-backed expectations." See *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979).

In attempting to fit this case within the framework of *Penn Central Transportation Co., supra,* the Secretary's brief ignores two important distinctions. First, the plaintiffs in *Penn Central* sought to obtain compensation for the loss in the value of their property resulting from the Landmark Law, whereas in the present case appellees have sought and obtained a declaratory judgement invalidating those portions of the Surface Mining Act which deprive them of the use

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[25] One author has described a right of procedural due process as one which requires that some legislative actions be undertaken only by a "governmental entity which is so structured and so charged as to make possible a reflective determination that the action contemplated is fair, reasonable, and not at odds with specific prohibitions in the Constitution." Note, *Insular Majorities,* 91 Harvard Law Review, 1373, 1414 (considering *Hampton* v. *Mow Sun Wong,* 426 U.S. 88 (1976)). See also, *Due Process of Lawmaking,* 55 Nebraska Law Review 197 (1976).

of their property and totally destroy its value. Second, the finding of the Court in *Penn Central* that the plaintiffs there had not been deprived of all reasonable use of their property is quite different from a case such as the present case where it was found that the Act has effectively precluded any economic use of the plaintiffs' property.

The Secretary continues to misrepresent the true impact of the Federal Act by arguing (Brief 52) that there is no "taking" under sections 515(d) and 522 because section 515(c) provides for variances from approximate original contour (an argument we have dealt with earlier in this brief), and because the prohibitions contained in section 522(e) against mining on specified lands were expressly made subject to "valid existing rights" and "do not apply to surface coal mining operations . . . which exist on the date of enactment." Brief 54. The reality is, however, that the exception for valid existing rights applies only to specific surface mining operations for which all required permits were issued prior to August 3, 1977, the effective date of the Act, and it has no applicability to the great preponderance of the lands and mineral interests of plaintiffs which were not "permitted" as of that date, and which are now subject to the restrictions imposed by the Act. Any suggestion that one who owned coal lands or mineral rights as of the date of the Act is unaffected by the section 522 restrictions is totally false. The clear intent of the language of the Act, as well as the Secretary's interpretation, is that "valid existing rights" applies only to surface mining acreage for which all permits were issued and in effect as of August 3, 1977. Except, then, for the limited parcels for which mine operators had obtained permits

before the date of the Act, the prohibitions of section 522 deny to the owner the use of his land for surface mining.

Similar efforts by the Secretary to analogize the challenged portions of the Act to other governmental regulations aimed at preventing "nuisances" cannot be seriously entertained. The Secretary's brief cites various cases which, on various "nuisance" theories, justify restrictions on property use. (See e.g. *Goldblatt* v. *Town of Hempstead, supra; Miller* v. *Schoene,* 276 U.S. 272 (1928); *Pierce Oil Corporation* v. *City of Hope,* 248 U.S. 498 (1919); *Hadacheck* v. *Sebastian, supra; Reinman* v. *City of Little Rock,* 237 U.S. 171 (1915); *Moore* v. *City of East Cleveland,* 431 U.S. 494, 513 (1977), cited at p.57 of appellant's brief). An examination of these cases provides no basis for factual analogy to the instant situation, since the challenged portions of the Act have been found by the trial court to be inconsistent with the common good of the citizens and communities in southwestern Virginia, and demonstrably unsound from an environmental standpoint. Far from constituting a nuisance, surface coal mining in southwestern Virginia must be regarded as benefiting the lives of the people. Moreover, although it was the legislative judgement of Congress that completely unregulated surface mining may have deleterious effects upon the environment and the public welfare, Congress also incorporated into its Statement of Findings and Policy the express finding that "surface mining operations . . . contribute to the economic well-being, security, and general welfare of the Nation," §101(j), and there is no suggestion in the Act that surface coal mining should be declared a nuisance.

Although in recent years this Court has shifted its emphasis in describing the elements of a taking, (see, e.g. *Andrus* v. *Allard,* 444 U.S. 51 (1979), in which the Court viewed a "taking" as "the loss of profit opportunity . . . accompanied by a physical restriction against the removal of coal" *Id.,* n.22; *Kaiser Aetna* v. *U.S.,* 444 U.S. 164 (1979), in which the Court identified factors such as "the economic impact of the regulation, its interference with reasonable investment-backed expectations and the character of the governmental action") the Court has also continued to cite *Pennsylvania Coal* with approval in these and other cases. However unable the Court may be to develop any "set formula" for determining when a taking has occurred, (*Penn Central Transportation Company, supra,*) it is clear that the "ad hoc factual inquiry" required by *Penn Central,* which was painstakingly undertaken by the district court here, has resulted in a well-substantiated determination that portions of the surface mining Act effectively take plaintiffs' property without just compensation in violation of the Fifth Amendment.

Finally, the Secretary suggests (Brief p.59) that the Tucker Act may provide an alternate basis for relief by way of compensation, but quickly adds: "One may doubt whether the jurisdictional grant in the Tucker Act was ever intended to cover taking claims arising from regulatory legislation."

The Tucker Act as an adequate remedy in cases such as this was rejected by the Court in *Duke Power Company* v. *Carolina Environmental Study Group,* 438 U.S. 59 (1978). The plaintiffs there were seeking a declaration that the Price-Anderson Act, which limits the monetary liability of electric utility companies for

nuclear accidents, could result in widespread property losses without adequate compensation, and thus contravened the Fifth Amendment. The Court held that the plaintiffs had stated a proper cause of action under 28 USC 1331, and rejected the contention that their "taking" claim could only be adjudicated in the Court of Claims under the Tucker Act. In commenting on this point the Court stated:

> "Mr. Justice Rehnquist suggests that appellees' taking claim will not support jurisdiction under section 1331(a), but instead that such claims can only be adjudicated under the Tucker Act, 28 USC 1491. We disagree. Appellees are not seeking compensation for a taking, a claim properly brought in the Court of Claims, but are now requesting a declaratory judgement that since the Price-Anderson Act does not provide advance assurance of adequate compensation in the event of a taking it is unconstitutional . . . While the Declaratory Judgement Act does not expand our jurisdiction, it expands the scope of available remedies. Here it allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained." 438 U.S. at 71, n.15.

Appellees here are seeking a declaratory judgement action before potentially uncompensable damages are sustained. In such event the question concerning the availability of the Tucker Act as a remedy becomes irrelevant, since the Tucker Act affords neither adequate compensation nor the precise relief to which appellees are entitled.

IV

THE DISTRICT COURT CORRECTLY ENJOINED THE ISSUANCE OF SUMMARY CESSATION ORDERS UNDER SECTION 521 (a) (2) OF THE ACT AND THE PREPAYMENT OF PENALTIES UNDER SECTION 518 ON THE GROUND THAT THEY VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Secretary's attack (Brief 62) upon the district court's decision on this issue is grievously inaccurate. The Secretary states that plaintiffs at trial neither alleged nor showed that any of them received a summary cessation order or suffered any loss as a result of any such orders. This statement is intended to support the Secretary's argument that no case or controversy exists, and that as a result the district court's decision was somehow premature.

The district court's Memorandum Opinion, as well as the record, directly refutes this assertion. The district court expressly found that three cessation orders were issued to Paramont Mining Corporation, one of the plaintiffs herein, and were later vacated as improper. It also found that the company sustained substantial losses as a result. (J.S. App. 65a-66a). Based on these and other similar examples the district court concluded:

> "The evidence shows that in enforcing the law, OSM inspectors have issued unjustified and arbitrary cessation orders causing irreparable harm to the mining companies." *Id.* at 65a.

and

"The court considered the evidence regarding the enforcement procedures used by the OSM inspectors to be shocking . . . ." *Id.* at 70a.

As a result of these findings, all of which are adequately supported by the evidence, the district court quite properly found that the application of Section 521 (a) (2) of the Act violates the due process clause of the Fifth Amendment because it allows federal inspectors to summarily close down a mining operation without proper cause and prior to any opportunity for a hearing.

The Secretary argues (Brief 62-63) that a prior hearing is not necessary, and cites a number of decisions of this Court. The district court considered most of the same cases (J.S. App. 63a-64a) and properly found them not controlling. Suffice it to say that none of those decisions sanctions a remedy so severe and so subjectively enforced as the case at hand.

The Secretary relies much upon *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), a case which involved multiple seizures of misbranded food supplements under Section 304 of the Food, Drug and Cosmetic Act, 21 USC 334. This Court rejected a due process challenge to the constitutionality of the procedures employed, even though a preliminary administrative determination of probable cause was made by the agency without any opportunity for the owner of the goods to have a hearing.

The Ewing case is factually distinguishable from the instant case. The administrative determination there appears to have been made at the highest level of the agency, and the preliminary agency action was

further reviewed by the office of the United States Attorney General. Only then, was the actual decision made to file a series of libels against the products involved.

While the Court in *Ewing* did state that a hearing to protect property rights is not always required before summary governmental action is taken, neither that case nor any of the others cited by the Secretary stands for the proposition he is urging upon this Court. He asks the Court to ignore the detailed findings of the district court regarding widespread abuses of power by his own agents. He quotes from *Ewing* (Brief 63) to buttress his statutory authority, in total disregard of the injuries judicially determined to have been brought about by his representatives. If an inspector employed by the Secretary can—as many have—shut down a mine and thereby cause severe financial loss, and unemployment, either upon a whim or in error, then the Secretary has successfully overturned the rule stated by this Court only four years ago that:

> "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society . . . The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) at 333, citing *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123 (1951). (Frankfurter, J. concurring.)

Surely this is the key to the instant case. The district court has required the Secretary to give a mine operator a hearing at a meaningful time and in a

meaningful manner. Because a summary cessation order can be the equivalent of an economic death sentence for a small mine operator, a hearing held before that sentence is carried out is the only one that is truly meaningful. Rather than accept the Secretary's suggestion to allow him unfettered power, this Court should uphold the eminently reasonable and modest constraints upon that power imposed by the district court. See also *Goldberg,* v. *Kelly,* 397 U.S. 254 (1970), where this Court, consistent with the views expressed in *Mathews,* held that due process requires an evidentiary hearing prior to even a temporary cessation of governmental economic benefits, since such action could deprive an eligible person of his very means of existence. *Id.* at 264. The analogy to the present case is clear because—as the district court found—a cessation order can deprive a mine operator and his employees of their means of existence.

In ruling on this issue the district court cited and followed the rule laid down by this Court in *Mathews* v. *Eldridge, supra,* where the Court stated:

> ". . . identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

In the present case, there can be no question that the private interests involved are substantial. As already noted, not only has the issuance of cessation orders been determined by the district court to cause significant monetary losses to mine operators, and loss of work to their employees, but such orders have had the effect of driving mining companies completely out of business. J.S. App.69a-70a. See, *Pennsylvania Coal Co.* v. *Mahon, supra; R.A. Holhman and Co.* v. *SEC,* 299 F.2d 127 (D.C. Cir.), *cert denied,* 370 U.S. 911 (1970).

The second factor to be considered under *Mathews*, the risk of erroneous deprivations, is also present here. As previously stated, the evidence before the district court described specific instances in which cessation orders were issued in an arbitrary and capricious manner. At trial the Secretary was unable to show even one instance in which the issuance of a cessation order was found to be necessary to protect public health and safety or the environment. The lack of objective criteria to guide the Secretary's inspectors requires them to make and implement purely subjective decisions.[26] Where there are no quantifiable guidelines upon which to base a summary deprivation of property, *Mitchell* v. *W.T. Grant Co.* 416 U.S. 600 (1974), where there is no provision for prior input by

[26] The Secretary relies (Brief 65) on *Sink* v. *Morton,* 529 F.2d 601 (4th Cir. 1975) to support the constitutionality of summary enforcement provisions. However, the enforcement provisions of the Federal Coal Mine Health and Safety Act of 1969 there at issue authorize summary withdrawal orders only where the inspector finds that an "imminent danger" to the lives and safety of the miners in underground mines exists. This is a quite different type of situation than one involving possible environmental harm under the Surface Mining Act.

the operator, *Montrym* v. *Panora,* 429 F.Supp. 393 (D.Mass. 1977), and where the governmental action will effectively paralyze the operation of a business and drive its operator to the wall, *United States* v. *Vertol,* 545 F.2d 648, 651 (9th Cir. 1976), such a property deprivation has not been accomplished with due process of law. Moreover, where the loss cannot be compensated, the private interest is of such a magnitude that a pre-hearing taking can rarely be justified. *Stanley* v. *Illinois,* 405 U.S. 646 (1972); *Stypmann* v. *City and County of San Francisco,* 577 F.2d 1338 (9th Cir. 1977). The existence of each of these factors in the present case amply demonstrates that the second element of the *Mathews* test has been met.

Finally, *Mathews* requires that the governmental interest in question be considered in light of the fiscal or administrative burdens that other procedural requirements would entail. This does not negate other considerations, but does require the court to balance the competing interests. Generally, a taking without a prior hearing to advance a valid government purpose can be justified only in extraordinary circumstances. *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). Where reasonable alternative means exist, they should be used. *Vlandis* v. *Klein,* 412 U.S. 441 (1973).

The Act has not involved such a large number of summary cessation order cases as would unduly burden the regulatory authority. Thus, unlike the situation in *Mathews,* the Secretary would not be confronted with a massive and excessively expensive task if he were required, as the district court directed, to afford mine operators a hearing prior to issuance of a cessation order. Moreover, in similar circumstances,

other federal agencies dealing with matters of safety, health and environmental protection have been able to function quite adequately with presanction hearing requirements. See Federal Water Pollution Control Act of 1972, 33 U.S.C. 1364; Occupational Safety and Health Act, 29 U.S.C. 662. Similar procedures, such as those required by the district court, will adequately protect the governmental interest asserted under the Act.

Section 518(c) of the Act also denies mine operators due process of law because it requires an operator who desires to contest a civil penalty assessment to place in escrow with the Secretary the amount of the assessed penalty in order to obtain any administrative or judicial review of the alleged violation or the penalty being proposed therefor. The district court was not confused, as suggested by the Secretary (Brief 69), with respect to the nature *and the impact or effect* of the prepayment requirement. On the contrary, the district court recognized that the "refund-with-interest" provision does not adequately protect operators because it ties up needed capital and can have the practical effect of a cessation order. J.S. App.69a-70a.[27] The district court understood only too well that this procedure can be and has been used to pressure operators to submit to unjustified orders of federal inspectors in order to avoid tying up scarce resources. See, *Star Coal Co.* v. *Andrus* No. 79-171-2 (S.D. Iowa Feb. 13, 1980), and *Indiana* v. *Andrus,* Nos. IP78-500-C and IP78-501-C (S.D. Ind. June 10, 1980),

[27] The Secretary has characteristically ignored these findings of the district court when he asserts that prepayment does not impose "significant burdens on mine operators" because interest on the prepaid penalty protects mine operators against financial injury. (Brief 70).

appeal pending No. 80-231, wherein two other district courts have reached similar conclusions.

Once again, the Secretary (Brief 67-69) has attempted to confuse the manner in which Section 518 and its implementing regulations operate. The Secretary states that a hearing is provided under his regulations with respect to the fact of violation without prepayment of penalty, but he admits that the hearing cannot involve a contest of the *amount* of the penalty unless the assessed amount is prepaid. Such distinction is of little practical use to a small or medium sized mine operator whose limited capital can be tied up for a considerable time without a complete hearing.

Appellees have been unable to discover any precedent for such a requirement and the Secretary has cited none. Clearly, the Act is not a revenue-producing statute. That being the case, no substantial public purpose is served either by statutory or administrative requirements which deny operators a full and complete hearing before being required to pay penalties.

CONCLUSION

The questions presented here are constitutional questions of great magnitude. If the Commerce Clause is now construed to give the federal government the power to dictate the terms and conditions under which the States may permit land to be used for surface coal mining it is inevitable that similar justification will be made for extending the reach of that power to other categories of land use until virtually all State land use powers are preempted. In a real sense this case presents the ultimate test of the principles of Federalism, and the continuing role of the States as sovereign entities.

Respectfully submitted,

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Nos. 79-1538 and 79-1596

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD PAUL HODEL,
ACTING SECRETARY OF THE INTERIOR, APPELLANT

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., APPELLANTS

v.

DONALD PAUL HODEL,
ACTING SECRETARY OF THE INTERIOR, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

REPLY BRIEF FOR THE ACTING SECRETARY OF THE INTERIOR

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In large measure, plaintiffs' brief fails to address the arguments advanced by the Secretary of the Interior in support of the Surface Mining Act. We therefore continue to rely primarily on the views ex-

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* The Secretary of the Interior has disqualified himself in this case.

pressed in the principal brief for the Secretary. We respond briefly to several of plaintiffs' contentions that in our view misdirect the judicial focus in this litigation or inject an element of factual confusion into the controversy.

1. In the first place, plaintiffs repeatedly attempt to treat this case as if it were an essentially factual dispute in which the Secretary's success on appeal depends on his ability to demonstrate that the district court's findings of fact are clearly erroneous (see, *e.g.*, Va. Br. 2-3, 5-6, 37-40). This is inaccurate. Plaintiffs are the parties challenging the constitutionality of an Act of Congress, and they therefore bear the heavy burden of establishing that the explicit and implicit legislative findings on which the statute is based are irrational. When the validity of a federal statute is at stake, a district court does not sit to try facts as it would in a criminal prosecution or a negligence suit. The court's inquiry is of a different character altogether. And, on appellate review, the question is not whether the district court's factual findings are clearly erroneous but whether the district court properly resolved the legal dispute regarding the existence *vel non* of a rational basis for the challenged legislative action.

2. The other main prong of plaintiffs' attack on the Surface Mining Act is the argument that the Act affects "land use" and that it therefore impermissibly exceeds congressional power under the Commerce Clause and invades the area reserved to the states under the Tenth Amendment. But there is no constitutional magic associated with the phrase "land use." The Constitution does not prohibit Congress from passing laws affecting land use, and it does not provide that states and local governments may exercise exclusive control over land use regula-

tion. The cases on which plaintiffs rely (Va. Br. 30) merely establish that state and local governments enjoy broad authority to regulate land use; they do not hold that Congress lacks power to enact measures affecting land use, even when those measures are rationally related to a legitimate governmental purpose within the powers delegated to Congress by Article I of the Constitution. In short, this case does not turn on whether the Surface Mining Act can or cannot be characterized as a "land use" measure. The question is rather whether Congress may properly regulate surface mining methods in the exercise of its Article I powers. If it can, any incidental effects on land use are irrelevant to the constitutional dispute.

3. Plaintiffs' criticism (Va. Br. 31-33) of the "steep-slope" variance procedure in Section 515(e) of the Act is unavailing. Plaintiffs complain that Section 515(e) does not offer a meaningful opportunity for divergence from the "approximate original contour" requirement because the statute in any event requires that the highwalls of reclaimed mining cuts be completely covered. This objection is both premature and incorrect. Plaintiffs have not identified a single instance in which the statutory obligation to cover the highwall has prevented a mine operator from making profitable use of a variance. Moreover, there is no reason to believe, as an *a priori* matter, that, after the highwall has been completely covered, flat bench land will not remain in sufficient quantities to permit commercial or residential development. In addition, plaintiffs' argument ignores the availability of variances under Section 515(c) of the Act, the provision governing variances when the mountaintop removal mining method is used. Finally, and perhaps most important, plaintiffs simply refuse to acknowl-

edge that, once statutorily required reclamation has been released, the mined lands may be used for any purpose whatever. If flat bench land is truly as valuable as plaintiffs contend, there should be no financial impediment to the reestablishment of flat areas on the sites of old mining cuts, once those areas have been restored and stabilized in the manner described by Congress.

4. Plaintiffs further contend (Va. Br. 33-35) that the Surface Mining Act is unconstitutional because "less intrusive means" could have been used by Congress to control the adverse effects of surface mining. Indeed, plaintiffs suggest that, even before enactment of the Surface Mining Act, the salutary aims of the statute were adequately served by the Clean Air Act, 42 U.S.C. (Supp. I) 7401 *et seq.*, and the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* The short answer to this argument is that Congress rejected it. The effectiveness of existing laws in dealing with a problem identified by Congress is ordinarily a matter committed to legislative judgment. At least in situations where no racial, ethnic, or otherwise suspect classifications are involved and no First Amendment interests are implicated, Congress is not obliged to proceed by adopting the minimal form of regulation that arguably could suffice to produce the desired result. And, in any event, here Congress expressly considered the effectiveness of existing legislation and concluded that additional measures were necessary to deal with the adverse effects of surface mining operations. See, *e.g.*, H.R. Rep. No. 93-1072, 93d Cong., 2d Sess. 123-124 (1974). Plaintiffs' argument therefore is neither factually nor legally adequate to justify invalidation of the Surface Mining Act.

5. Plaintiffs' discussion (Va. Br. 48) of the "valid existing rights" provision in Section 522(e) of the Act is misleading. Under Section 522(e), the restrictions on surface mining operations near roads, schools, churches, parks, public buildings, and cemeteries are expressly made "subject to valid existing rights." Plaintiffs assert (Va. Br. 48) that this exception "applies only to specific surface mining operations for which all required permits were issued prior to August 3, 1977, the effective date of the Act * * *." The language of Section 522(e) does not say that "valid existing rights" may be recognized only where all required permits were obtained before August 3, 1977. Plaintiffs cite no authority for their interpretation, but it is apparently based on 30 C.F.R. 761.5 (a)(2)(i), 44 Fed. Reg. 15342 (1979), a regulation promulgated to implement Section 522(e) during the Act's permanent phase. That regulation, however, has been remanded to the Secretary by the United States District Court for the District of Columbia, the court vested with exclusive jurisdiction to review the regulations promulgated under the Surface Mining Act. See *In re Permanent Surface Mining Regulation Litigation*, 14 E.R.C. 1083, 1091 (D.D.C. Feb. 26, 1980), appeals pending, Nos. 80-1810 *et seq.* (D.C. Cir., filed Aug. 26, 1980). The Secretary did not appeal this aspect of the district court's decision, and the regulation is not now effective. (Even before the decision, the Secretary did not interpret the regulation to make pre-enactment issuance of all necessary permits a *sine qua non* for recognition of "valid existing rights" under Section 522(e). The regulation was intended to provide only that one way in which a mine operator could conclusively establish his "valid existing rights" was to show that all necessary permits had

been obtained before passage of the Act. 44 Fed. Reg. 14993 (1979).) The Secretary is now considering the appropriate content of a revised regulation on the subject. The limited legislative history of Section 522(e) makes it reasonably clear that Congress used the phrase "valid existing rights" to include more than those surface mining operations that had actually received permits before the date of the statute. See H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 95 (1977), citing *United States* v. *Polino*, 131 F. Supp. 772 (N.D. W. Va. 1955).

6. Plaintiffs' comments regarding the Tucker Act and *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), misinterpret the Court's opinion in that case. Appellees in *Duke Power* objected to the Price-Anderson Act on two theories. They contended that the statute violated both the Due Process Clause and the Just Compensation Clause of the Fifth Amendment. 438 U.S. at 69. The Court ruled that the potential availability of a Tucker Act remedy in the Court of Claims for any uncompensated taking of property effected by the challenged statute did not deprive the district court of *jurisdiction*, under 28 U.S.C. 1331, to consider appellees' constitutional claims. 438 U.S. at 71 n.15. But, because of the Tucker Act option, the Court found it unnecessary to address the *merits* of appellees' Just Compensation Clause argument or the propriety of granting equitable relief to remedy an uncompensated taking. *Id.* at 94 n.39. The Court's approach in *Duke Power* thus supports the view expressed in the Secretary's principal brief (Br. 58-60) that any taking of a particular parcel of property allegedly effected by the Surface Mining Act is not unconstitutional unless just compensation is unavailable and that therefore declaratory and injunctive relief should not be awarded unless and until

the plaintiff or plaintiffs allegedly injured by a particular taking have established that their legal remedies are inadequate. The Secretary did not assert that the possibility of a monetary recovery under the Tucker Act defeats the jurisdiction of this Court or the district court; he suggested only that, where the Tucker Act option has not been explored, it may be premature for this Court to resolve the merits of the taking question.

7. Plaintiffs contest (Va. Br. 52) the accuracy of the Secretary's statement (Br. 62) that "[p]laintiffs did not allege that they, or any one of them, received a summary cessation order under Section 521(a)(2) or suffered loss as a result. Nor was any such showing of harm made at trial." In challenging this assertion, plaintiffs rely solely on three cessation orders issued to plaintiff Paramont Mining Corporation. See J.S. App. 65a-66a. But no allegations regarding those cessation orders are contained in plaintiffs' complaint, and the record is silent on the question whether the orders were *summary* cessation orders issued under Section 521(a)(2) or ordinary cessation orders issued after a notice of violation and expiration of an abatement period under Section 521(a)(3). See the general explanation of the cessation order procedures at pages 60-62 of the Secretary's principal brief. The district court's amended order enjoins Section 521 of the Act "*only* insofar as [it] relate[s] to summary issuance of cessation orders" (J.S. App. 2a; emphasis in original). Plaintiffs did not attempt to introduce the Paramont cessation orders into evidence, and the trial testimony does not disclose the nature of the orders. See Pr. Tr. 131-137; Tr. 683-686.[1]

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[1] "Pr. Tr." refers to the transcript of the preliminary hearing in February 1979.

In fact, an examination of the three cessation orders issued to Paramont reveals that only one of the three orders was issued under Section 521(a)(2); the remaining two orders were issued under Section 521(a)(3).[2] The one summary cessation order (No. 78-I-15-1, issued Aug. 16, 1978) was issued because Paramont allegedly was conducting surface mining operations in an area for which it had not obtained a permit. No evidence in the record shows that Paramont suffered any significant financial loss as a result of the issuance of that cessation order.[3]

The district court's mistaken conclusion that Paramont had suffered a great financial loss as the result of the issuance of a summary cessation order was based on an order issued on January 4, 1979 (No. 79-I-19-1). See Tr. 684-685. An examination of that cessation order reveals, however, that it was issued under Section 521(a)(3) and not under Section 521(a)(2). It was not, in other words, a summary cessation order. The order was issued for the failure to abate a violation concerning which a notice of violation had been issued on November 27, 1978.[4] The notice stated that abatement should be completed

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[2] Copies of the three orders have been lodged with the Clerk of this Court.

[3] An administrative law judge ruled that the summary cessation order was improper because the lack of a permit did not necessarily establish the "imminent danger" to health and safety or the reasonable expectation of "significant, imminent environmental harm" required by Section 521(a)(2) as a precondition for summary administrative action. A copy of the administrative law judge's decision and order has been lodged with the Clerk of the Court.

[4] A copy of that notice of violation (No. 78-I-19-7) has also been lodged with the Clerk of this Court.

by December 27, 1978. At any time after November 27, 1978, Paramont was entitled to request a public hearing under Section 525(a) of the Act and to request temporary relief from the Secretary under Section 525(c). It did not do so. Whatever harm Paramont may have suffered after issuance of the Section 521(a)(3) cessation order on January 4, 1979, it was not attributable to the summary cessation order procedure attacked in this litigation and invalidated by the district court. The Paramont cessation orders therefore provide no support for plaintiffs' challenge to the accuracy of the statements made in the Secretary's opening brief.

For these reasons, and the reasons stated in the principal brief for the Secretary, the judgment of the district court should be reversed as to all questions before the Court, except the Commerce Clause question raised by plaintiffs' appeal in No. 79-1596. In that respect, the judgment should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 338091 257

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NOV 19 1980
MICHAEL RODAK, JR., CLE

NO. 79-1538

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET. AL.,
Appellees

NO. 79-1596

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.,
Appellants

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLANT-INTERVENORS

Robert T. Copeland
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QUESTIONS PRESENTED

1. Whether the requirement of Sections 515(d) and (e) of the Surface Mining Control and Reclamation Act of 1977 that surface mined land on steep slopes be returned to the approximate original contour violates the Tenth Amendment.

2. Whether Sections 515(d) and (e) and 522 of the Surface Mining Control and Reclamation Act of 1977 take private property without just compensation in violation of the Fifth Amendment.

3. Whether Sections 518, 521, and 525 of the Surface Mining Control and Reclamation Act of 1977, to the extent those sections provide for summary issuance of cessation orders and civil penalties, violate the procedural due process guarantee of the Fifth Amendment.

PLAINTIFFS

Virginia Surface Mining & Reclamation Association, Inc.

A & S Coal Company

Amos Ridge Coal Company

Bevins Mining Company, Inc.

Big Fork Coal Company

Bill's Branch Coal Company

Black Creek Coal Company

Bob's Branch Coal Company

Bossco, Inc.

Bradley Branch Coal Company

Brushy Ridge Coal Company

Buchanan & Sons

Burnrite Coal Company

Cabot Coal Corp.

Cardinal Mining Ltd.

Chaparal Mining Company, Inc.

Charles D. Dale Coal Company

Claude Yeary Coal Company

PLAINTIFFS, CONT'D

Conley Mullins Coal Company

Conway Coal Company

Copeland Coal Company

Curt's Coal Company

Deena Coal Company

Double D Coal Company

Elkins-Kendrick Enterprises

Five Oaks Coal Company

Flat Gap Mining Company

Gale Coal Company, Inc.

Genoa Coal Company, Inc.

G & O Coal Company

G & T Coal Company

H.B. Rowe & Company

H.C. Bostic Coal Company, Inc.

H.R.C. Coal Company, Inc.

Highland Enterprises

Hi Heat Coal Company

Horn Construction Company, Inc.

PLAINTIFFS, CONT'D

Humphreys Enterprises

J.B. Coal Company

Jil-Mar Coal Company, Inc.

Lyons Coal Company

Laurel Creek Coal Company

M & M Coal Company, Inc.

DEFENDANTS

Cecil D. Andrus, Secretary of the Interior

Town of St. Charles, Intervenor

Virginia Citizens For Better
Reclamation, Inc., Intervenor

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OPINIONS BELOW

The opinion of the district court on appeal here, as yet unreported, appears as Appendix D in the jurisdictional statement filed by the Appellant Secretary of the Interior in this case. Secretary's Jurisdictional Statement pp. 21A-75A. The amendment of this order appears as appendices A and B of the Secretary's Jurisdictional Statement. Secretary's Jurisdictional Statement pp. 1A-16A.

The opinion of the United States Court of Appeals for the Fourth Circuit, dissolving a preliminary injunction granted by the district court is reported at 604F. 2d 312 (1979) and appears as Appendix E in the Secretary's Jurisdictional Statement. Secretary's Jurisdictional Statement 76A-85A. The opinion of the district court at the preliminary injunction stage is not reported and appears in the Secretary's Jurisdictional Statement, Appendix F. Secretary's Jurisdictional Statement 86A-101A.

JURISDICTION

The final judgment of the district court was entered on January 3, 1980. An amending order was entered by the district court on January 21, 1980. The Virginia Citizens for Better Reclamation and the Town of St. Charles, Virginia filed their jurisdictional statement on March 15, 1980. This Court noted probable jurisdiction on October 6, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL PROVISIONS, STATUTES
and REGULATIONS:

U.S. Constitution, Amend. V

U.S. Constitution, Amend. X

The Surface Mining Control and Reclamation Act,

P.L. 95-87, 91 Stat 445, 30 U.S.C 1201 et.seq.

P.L. 95-87, §10(g), 30 U.S.C. 1201(g)

P.L. 95-87, §102(c), 30 U.S.C. 1201(c)

P.L. 95-87, §503, 30 U.S.C. 1253

P.L. 95-87, §515(d) and (e), 20 U.S.C. 1265(d) and (e)

P.L. 95-87, §518

P.L. 95-87, §521(a)(1)-(3)

P.L. 95-87, §522

P.L. 95-87, §525

STATEMENT

On August 3, 1977, Congress responded to public outcry against the abuses of inadequately controlled and regulated strip mining by passing the Surface Mining Control and Reclamation Act, P.L. 95-87, 91 Stat. 445, 30 U.S.C. 1201 et. seq. On October 23, 1978, the Virginia Surface Mining and Reclamation Association, Inc., sixty-three of the association's member coal companies, and four individual land owners filed suit in the United States District Court for the Western District of Virginia broadly challenging the constitutionality of the Act and praying that the Secretary of the Interior be enjoined from enforcing the Act in Virginia. The Commonwealth of Virginia and the Town of Wise, Virginia, in response to the complaints of the strip miners, intervened on behalf of the plaintiffs. The Virginia Citizens for Better Reclamation, Inc., and the Town of St. Charles, Virginia, concerned with the Commonwealth's history of condoning strip mine abuses, intervened in support of the Secretary's enforcement of the Act.

On February 14, 1979, after a hearing on plaintiff's motion for a preliminary injunction, the district court enjoined the Secretary from enforcing Sections 502 through 522 of the Act, pending final disposition of the plaintiffs' action on the merits. On August 10, 1979, this injunction was dissolved by the Fourth Circuit Court of Appeals. 604 F. 2d 312.

The district court continued its review of the volumes of evidence adduced in the thirteen day trial on the merits held while the Secretary's appeal to the preliminary injunction was pending. On January 3, 1980, the district court entered its final order declaring Sections 515 (d) and (e), 518, 521 (a)(1)-(3), 522 and 525 of the Act unconstitutional and permanently enjoining their enforcement. Responding to wide spread confusion in the coal industry concerning the ramifications of the decision, the district court coupled its denial of the Secretary's Motion for a Stay pending appeal with an order and an opinion clarifying its permanent order. This clarification was entered on January 21, 1979.

The Secretary, the Virginia Citizens for Better Reclamation, and the Town of St. Charles filed motions for a stay of the district court's order with the Chief Justice of this Court, sitting as Circuit Justice for the Fourth Circuit. On February 25, 1980, the Chief Justice signed an order staying the district court's order pending filing of a response by plaintiffs. This response and the motions for a stay were considered by the entire Court and, on March 17, 1980, this Court entered an order staying the judgment of the district court, pending the timely filing and disposition of the appeal.

SUMMARY OF ARGUMENT

I. THE REQUIREMENTS OF SECTIONS 515(d) AND (e) OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 CONCERNING RESTORATION TO THE APPROXIMATE ORIGINAL CONTOUR DO NOT VIOLATE THE TENTH AMENDMENT.

The district court reasoned that, if Congress set a nationally applicable standard for an industry and gave the individual states the choice of having that standard enforced by a state or federal agency, and a court determined that the standard placed an undue economic burden on a state, then the standard violated the Tenth Amendment as to that state. The Tenth Amendment, as construed in National League of Cities v. Usery 426 U.S. 833 (1976), does not lend itself to such an interpretation and even if it did, it would still permit the sections in question because they do not place undue economic burden on the Commonwealth of Virginia.

ARGUMENT

I. THE REQUIREMENTS OF SECTIONS 515(d) AND (e) OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 CONCERNING RESTORATION TO THE APPROXIMATE ORIGINAL CONTOUR DO NOT VIOLATE THE TENTH AMENDMENT.

A. The district court applied an impermissible standard of review.

Sections 515(d) and (e) of the Act, 30 U.S.C. 1265(d) and (e) are set out fully at pages 124A-127A in the Appendix to the Secretary's Jurisdictional Statement. Those Sections establish additional performance standards for surface mining on "steep slopes", as defined in Sections 515(d)(4):

> "Any slope above twenty degrees or such lesser slope as may be defined in view of particular geographic characteristics."

Those sections were found to violate the Tenth Amendment because the provision that surface-mined steep slopes be restored to the approximate original contour were, in the opinion of the district court,

> "...environmentally unsound and do not serve the interests of the federal government and are so burdensome on the Commonwealth of Virginia as to threaten its economy."

District Court clarifying and amending order, entered January 21, 1980. Secretary's Jurisdictional Statement, p. 1A.

The key issue presented to this Court in the appeal at hand is the meaning of National League of Cities v. Usery, 426 U.S. 833 (1976). The National League of Cities ruling that the Tenth Amendment prevented federal minimum wage and overtime standards from reaching the employees of states and subdivisions of states undeniably rejuvenated the Tenth Amendment as a limitation on the Congressional commerce power. Compare, Maryland v. Wirtz, 392 U.S. 183 (1968). The question in this case is the parameters of judicial review under that rejuvenated limitation. The language of National League of Cities instructs that the Tenth Amendment is relevant only when Congressional Action is:

> "Directed not to private citizens, but to the States as States."

426 U.S. at 845.

The Court began the analysis by addressing the issue of whether the Act was directed to private

citizens or "to the States as States". The district court found that:

> "While the Act ultimately affects the coal mine operator, its pervasive effect is on the state's legislative authority and on state control of land within its boundaries"

District Court Opinion, January 3, 1980. Secretary's Jurisdictional Statement, p. 32A.

That the Act's "pervasive effect is on the state's legislative authority" is irrelevant. The Act does not regulate the Commonwealth of Virginia or the state legislature, rather it establishes regulations applicable to surface coal mining operations in Virginia, as well as other states, and it offers the Commonwealth the opportunity to enforce these regulations.[1]

---

[1]Section 503 of the Act, 30 U.S.C. 1253 provides that any state desirous of assuming permanent regulatory authority over surface coal mining within its borders may do so by submission of an acceptable proposed program to the Secretary demonstrating that the state legislature has enacted laws implementing the environmental protection standards established by the federal statute and accompanying regulations and that the state has the administrative and technical ability to enforce those standards. Should

the Secretary disapprove of such a proposed program in accordance with the time schedules and procedures established in this section, the Secretary will implement a federal program regulating surface mining in that state.

When Congress chose to give the states the option of enforcing federal standards themselves or having those standards enforced by a federal agency, it did not mean those standards were, therefore, directed "to the States as States". Under the Tenth Amendment, there are three classes of powers: powers held by the United States, powers held by the States respectively, and powers held by the people. The United States did not lose the power to regulate interstate commerce simply by offering the respective states an opportunity to enforce that power within their borders. Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How) 299 (1851).

The district court, after having determined that the regulations were directed to the "States as States", proceeded to weigh the interplay of federal and state interests involved:

> In considering the relief to be granted in a case like this, the state and federal governments' interests must be balanced. The approximate original contour requirement imposed by the Act is not environmentally sound and does not serve the conservation interests of the federal goverment. No harm will be visited upon the federal government nor to the environment to permanently enjoin this provision of the Act. On the other side, this provision and the post-mining land use restrictions drastically affect the economy of the Commonwealth of Virginia, making it economically and physically impossible to mine coal, and prevent the state from using its land for agricultural purposes, for construction of airports, schools, hospitals and for other activities. By recognizing these facts and granting relief, the preemptive power of the federal government through the Commerce Clause is recognized and the rights of the Commonwealth of Virginia, as set out in the Tenth Amendment, are preserved.

Secretary's Jurisdictional Statement, pp. 40A-41A.

The district court invalidated an Act of Congress on cost-benefit grounds. The balancing-test approach, wherein the court attempted to second guess the economic wisdom of exercise of the commerce power, was rejected by this court over forty years ago. See Nebbia v. New York, 291 U.S. 502 (1834). The opinion below invoked the Tenth Amendment by casting the cost factor in terms of the federal law's impact on the state's economy, but the analysis was

one of substantive due process nonetheless. If this Court had intended National League of Cities to resurrect that long buried doctrine under the auspices of the Tenth Amendment, it would have so held long ago.

Additionally, the idea that the states can and will adequately enforce federal standards is fundamentally unsound. If the states were left free to regulate potentially harmful economic activities within their borders, there would be a strong and ongoing incentive for the states to promulgate inadequate regulations in order to create a competitive advantage for local industry. On the other hand, when the federal government regulates a potentially harmful aspect of industry under its commerce power, performance standards can be more uniform and the undesirable activities eliminated without putting any states' economy at a disadvantage. This benefit of federal enforcement has long been recognized by this court. See United States v. Darby 312 U.S. 100 (1941).

Removing regulatory inequities between states was a major purpose of the Act. In §101 (g), 30 U.S.C. 1201(g), it is stated that:

> "The Congress finds and declares that... (g) surface mining and reclamation standards are essential in order to insure that competition and interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders."

If the district court's order is allowed to stand, state legislatures will, one by one, be subjected and in all probability succumb, to the pressure of coal operators hungry for competitive advantage, until economic balance is achieved and the nation's coal fields lie devastated without regard to state boundaries.

B. EVEN ASSUMING ARGUENDO THE STANDARD OF REVIEW APPLIED BY THE DISTRICT COURT TO BE APPROPRIATE, IT'S HOLDING IS WRONG BECAUSE THE SECTIONS IN QUESTION ARE NOT AN UNWARRANT- ED BURDEN ON THE STATE'S ECONOMY.

The district court opinion indicated great concern for potential impact of Sections 515(d) and (e) on Virginia's economy.

> The cost of production of coal has increased up to seventy percent (70%). On occasion the economic impracticality of strip mining coal is outweighed by physical realties; equipment may not be available to cover the highwall on a steep slope to restore the original contour. These effects aggregate to undermine the Commonwealth's economy: coal companies have gone out of business, between five hundred and one thousand coal miners have lost their jobs; income from surface mining permits has decreased; the coal-based revenues that the counties rely on to operate have been reduced.

District Court Opinion, January 3, 1980, Secretary's Jurisdictional Statement, pp. 37A-38A.

These conclusions are in direct opposition to the explicit findings of Congress that steep slopes can be surface mined and restored to the approximate original contour without an undue burden being placed on the coal operator. Congress not only concluded that such restoration is physically and economically feasible, but actually found that restoration to approximate original contour is already being accomplished in some Appalachian states. See, H. R. Rep. No. 95-218, 95th Congress, first session, 98-100, 120-124.

Furthermore, the implication in the opinion below that the problems of the state's coal industry are all attributable to Sections 515(d) and (e) of the Act ignores the many other factors behind the slow coal market, such as the slow down in the steel and auto industries, and the difficulties in shipping coal to the European market.

Finally, in those cases where the conclusion of the district court was correct that the steep slope provisions of Section 515(d) and (e) make it impossible for a particular operator to surface mine a particular area, the district court apparently overlooked alternative means of reaching the coal-i.e. use of underground mining technology or contractual arrangement to have the coal surface mined by an operator with the engineering expertise to extract the coal and restore the site in satisfaction of Sections 515(d) and (e). That coal which cannot be mined by either of these alternatives can, without serious harm to the economy of Virginia, remain in the ground until rapidly developing technology

renders extraction feasible without damage to the environment.[2]

II. THE LIMITATION ON MINING METHODS IMPOSED BY SECTIONS 515(d) AND (e) AND 522 DOES NOT WORK SUCH A DIMINUTION IN PROPERTY VALUE AS TO CONSTITUTE A COMPENSIBLE TAKING UNDER THE FIFTH AMENDMENT.

Sections 515(d) and (e), as noted above, require restoration of surface-mined steep slopes to the approximate original contour. Section 522, set out in full in the Secretary's Jurisdictional Statement, pp. 136A-142A, declares certain areas unsuitable for surface mining, including lands within the national parks system, lands within one hundred feet of the outside right-of-way line of any public road, lands within three hundred feet of a school, and other areas. Section 522 also contemplates procedures for designating other lands

[2]Section 102(c), 30 U.S.C. 1202(c), says "It is a pupose of this Act to...(c) assure surface mining operations are not conducted where reclamation as required by this Act is not feasible."

unsuitable for stripping. In other words, on lands affected by Sections 515(d) and (e), coal may be extracted only by surface mining in accordance with law and/or by deep mining. Coal lying under land affected by Section 522 may be deep mined only.

The district court held that these Sections:

> "Effectively prohibit the mining of a person's private property, thereby resulting in a physical property restriction and a nearly complete dimunition in the value of the land, as well as a loss of future profits."

District Court Order, January 3, 1980. Secretary's Jurisdictional Statement, pp. 19A.

Accordingly, the district court held that those provisions impermissibly violated the Fifth Amendment.

The flaw in this rationale is that it fails to consider the possibility of reaching the coal through the underground mining method and belies Congressional findings that the performance standards of §515(d) and (e) are economically and physically feasible. Considering these, it is obvious that the sections in question do not "prohibit the mining of a person's private property;"

they merely require that mining rights be exercised in a manner which, in the judgment of Congress, is not unacceptably destructive of the environment and the rights of surrounding citizens.

Furthermore, the district court's suggestion in its order issued January 3, 1980, Secretary's Jurisdictional Statement, at p. 57A, that the federal government must compensate coal owners in exchange for their adoption of socially acceptable mining and reclamation practices simply does not square with society's acceptance and validation of a wide range of uncompensated land use regulations ranging from traditional nuisance law and zoning ordinances, to extensive federal air and water pollution controls and other environmental laws. Many cases can be cited to illustrate the law's recognition that the use of private property may be legislatively regulated without compensation to serve the public good.

For instance, in Goldblatt v. City of Hempstead 369 U.S. 590 (1962), this Court upheld a city safety ordinance which banned any excavation below the

water table and effectively prohibited an established sand and gravel mining business from continuing operations. This law prevented the most lucrative use of the land and caused severe individual hardship, but was nevertheless held constitutional. The Court found that government regulation to prevent noxious land uses from inflicting injury upon the community is necessary to the existence and safety of organized society. Id. at 593. See also, Transportation Company, et. al. v. City of New York, 438 U.S. 104 (1978), (application of New York City's Landmarks Preservation law, which prevented additions to the historic Penn Central Terminal, did not constitute a taking even though it caused significant diminution in value.) Hadachek v. Sebastian, 239 U.S. 394 (1915), (a City of Los Angeles zoning ordinance prohibiting the establishment or operations of brickyards within described geographical limits, thereby causing a

decrease in the value of plaintiff's property from $800,000.00 to $60,000.00, held not a taking). In declaring Sections 515(d) and (e) and Section 522 unconstitutional under the Takings Clause, the district court relied heavily on Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922). See District Court Opinion, January 3, 1980, Secretary's Jurisdictional Statement, pp. 45A-46A, 50A-51A, 55A, 57A. Pennsylvania Coal Company, an opinion written by Justice Holmes, struck down as an uncompensated taking, a Pennsylvania law prohibiting underground mining in areas where such mining would cause subsidence of surface structures. The district court's reliance on this case is misplaced because the statute involved therein amounted to an absolute prohibition against the mining of coal in the affected areas. Sections 515(d) and (e) and 522 do not work such a prohibition, but rather they merely limit mining methods.

III. THE DISTRICT COURT'S RULING THAT ISSUANCE OF SUMMARY CESSATION ORDERS AND CIVIL PENALTIES UNDER SECTIONS 518, 521, and 525 OF THE ACT OFFENDS PROCEDURAL DUE PROCESS IS NOT CONSISTENT WITH CASE LAW UPHOLDING SUMMARY ADMINISTRATIVE ENFORCEMENT ACTION IN SIMILAR CIRCUMSTANCES.

A. SUMMARY CESSATION ORDERS

Section 521(a)(2), set out in full in the Secretary's Jurisdictional Statement at pp. 132A-133A, authorizes the Secretary to issue an order that mining immediately cease to abate danger to public health or safety or the environment and, if necessary, to immediately take remedial measures. Section 525 set out in the Secretary's Jurisdictional Statement at pp. 142A-145A, provides the mine operator agrieved by an immediate cessation order the opportunity to object to such order at a public hearing and obtain judicial review.

This process is not unusual, nor is it violative of procedural due process. This Court has for years recognized that immediate threats to a significant public interest justify administrative action prior to a hearing. Calero-Toledo v. Pearson Yacht Leasing Company, 416 U.S. 663 (1974), (seizure of a rental yacht carrying marijuana); Ewing v. Mytinger and

Casselberry, Inc., 339 U.S. 594 (1950), (seizure of mislabeled vitamin product); Bowles v. Willingham, 321 U.S. 503 (1944), (rent control orders); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1931), (collection of federal revenue); Central Union Trust Company v. Garvan, 254 U.S. 554 (1921), (seizure of enemy property); North American Cold Storage Company v. Chicago, 211 U.S. 306 (1908), (seizure of contaminated food).

The district court's chief objection to the issuance of summary cessation orders was based upon concern that in the past, such orders have occasionally been erroneously issued. District Court Opinion, January 3, 1980. Secretary's Jurisdictional Statement, pp. 65A-67A, 72A-73A. The objection that a particular administrative procedure has, in the past, been abused, does not invoke the doctrine of procedural due process. As this Court pointed out in Ewing v. Mytinger and Casselberry, Inc., 339 U.S. 594 (1950):

> Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.

339 U.S. at 599.

B. SUMMARY ISSUANCE OF CIVIL PENALTIES

Section 518 of the Act, set out fully in the Secretary's Jurisdictional Statement, pp. 127A-131A, establishes procedures governing the issuance of civil penalties under the Act. The rule regarding hearings is explicit.

> A civil penalty shall not be assesed by the Secretary only after the person charged with the violation... has been given an opportunity for a public hearing.

Section 518(b).

The district court acknowledged the procedural adequacy of this, but, noting that under 518(a), the issuance of a civil penalty is mandatory when the violation leads to a cessation order, concluded that where summary issuance of a cessation order would violate due process the accompanying civil penalty

and therefore the civil penalty would also be a due process violation, and therefore the civil penalty section must fall. District Court Opinion, January 3, 1980, Secretary's Jurisdictional Statement, pp. 67A-69A.

The procedural adequacy of the summarily issued cessation order has already been shown, supra. The civil penalty accompanying such order is likewise valid. Further, the civil penalty provision is legitimate because it does not constitute final action, but a mere preliminary hearing. As Justice White wrote in Arnett v. Kennedy, 416 U.S. 134, 187 (1974) (concurring and dissenting opinion),

> [I]n passing upon claims to a hearing before preliminary but non-final deprivations, the usual rule of this Court has been that a full hearing at some time suffices.

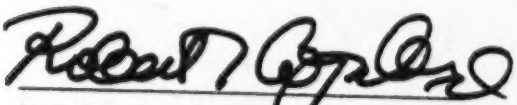
CONCLUSION

The judgment of the district court, insofar as it found Sections 515(d) and (e), 518, 522, and 525 of the Act unconstitutional, should be reversed.

Respectfully submitted,

ROBERT T. COPELAND
Attorney for defendant-intervenors

Robert L. Bushnell
Counsel to the Board of Directors of the Virginia Citizens for Better Reclamation, Inc.



Robert T. Copeland

CERTIFICATE OF SERVICE BY MAIL

I, Barbara E. Grove, an agent of the law printing firm of Lawyers Printing Co. of Richmond, VA, being of mature age and familiar with the requirements of service of briefs and other similar legal documents, do hereby certify that on this 18th day of November, 1980, three copies of a document entitled

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 79-1538

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

Appellant,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET. AL.,

Appellees.

NO. 79-1596

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Appellants,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLANT-INTERVENORS

were served on the following persons, who have been represented to me as counsel to be served in said action, by first class mail with proper postage applied and deposited in a mail box of the United States Postal Service:

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STATE OF VIRGINIA)

) to-wit:

CITY OF RICHMOND)

The foregoing instrument was acknowledged before me this 18th day of November, 1980.

Given under my hand this 18th day of November, 1980.

My commission expires: May 29, 1984.

Pamela A. Brumbaugh

Notary Public

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND
RECLAMATION ASSOCIATION,
THE COMMONWEALTH OF VIRGINIA, AND
THE TOWN OF WISE, VIRGINIA,
Appellees.

No. 79-1538

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

STATE OF INDIANA, INDIANA COAL ASSOCIATION,
MEADOWLARK FARMS, INC., AMAX COAL COMPANY,
PEABODY COAL COMPANY, AND JOHN A. CONLON,
Appellees.

No. 80-231

On Appeals From The United States District Court For the Western District of Virginia, and The United States District Court For the Southern District of Indiana

BRIEF OF THE STATES OF ALASKA, HAWAII, IDAHO, KENTUCKY, LOUISIANA, NEBRASKA, NEW MEXICO, OKLAHOMA, RHODE ISLAND SOUTH DAKOTA AND UTAH, AS AMICI CURIAE

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The several States appearing as *amici curiae* here respectfully urge the Court to affirm the decisions of the respective district courts in Virginia and Indiana holding that Title V of the Federal Surface Mining Control and Reclamation Act of 1977 unconstitutionally interferes with inherent sovereign powers of the States to regulate the use of private non-federal lands within their borders, and with State land-use decisions respecting the development of mineral resources vital to the progress and prosperity of their communities and citizens.

INTERESTS OF AMICI CURIAE

The constitutional issues presented in these cases are of critical importance to the States in terms of retaining control over their essential State powers, and their ability to continue to function effectively within a federal system. If the authority to determine the appropriate use of private lands within the States may, by Congressional fiat, be transferred to a federal agency in Washington an essential element of State sovereignty is effectively destroyed, and long established federal-state relationships drastically altered.

From the earliest days of the Republic the individual States and their constitutent counties and municipalities have exercised land use powers, subject only to constitutional limitations upon taking of private property without just compensation and due process of law under the Fourteenth Amendment. *Penn Central Transportation Company* v. *New York City,* 438 U.S. 104 (1978). Such land use powers have included the promulgation of zoning laws and regulations, enforcement of building codes, granting and terminating permits for operation of mines and quarries, imposition of severance taxes on minerals

extraction, exercise of eminent domain, and many related police power functions. As noted by this Court in *Warth* v. *Seldin,* 422 U.S. 490, 508 n.18 (1975) "[Z]oning laws and their provisions, long considered essential to urban planning, are peculiarly within the province of the State and local legislative authorities." See also, *Village of Euclid* v. *Ambler,* 272 U.S. 365 (1926).

It hardly need be emphasized that the States have an overriding interest in preservation of these integral functions, and are deeply concerned by the federal government's assertion of preemptive power under the Surface Mining Act to dictate the land use criteria which a State must adopt and enforce as a precondition to permitting surface mining on lands within the State. Although the Act's Statement of Policy in section 101(f) purports to recognize State primacy "in developing, issuing and enforcing regulations for surface mining and reclamation operations," the actual effect of Title V is quite the opposite since it provides that unless a State regulatory program conforms in all respects with the standards established by the Act and the regulations issued by the Secretary of the Interior the State program is displaced by a federal program enforced and administered by the Secretary.

TITLE V OF THE ACT CONSTITUTES LAND USE LEGISLATION WHICH SUPERCEDES STATE GOVERNMENTAL PROCEDURES FOR LAND USE PLANNING, AND, AS SUCH, USURPS POLICE POWERS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT

Each of the respective district courts below found, with abundant supporting evidence, that the focus and thrust of the Surface Mining Act is control of the use of

land, and that its effect is to preempt the traditional land use powers reserved to the States under the Tenth Amendment. Any doubt as to the preemptive character of the Act is quickly dispelled by the plain language of Section 503 which provides that a State may not allow private lands within its jurisdiction to be used for surface coal mining unless it adopts a state law providing for regulation of surface mining and reclamation operations, and imposes sanctions for violations of such regulations, which "shall meet the minimum requirements of this Act." Other sections of Title V prohibit surface mining on various categories of lands, require that a State desiring to retain any enforcement authority under the Act must establish a planning process for designating other land areas as unsuitable for mining in accordance with the specified criteria of the Act, and dictate in great and massive detail the terms and conditions under which a State may grant or renew permits for surface coal mining. (Sections 502, 506, 507, 522). The Act also deals extensively with permissible post-mining use of lands after mining and reclamation have been completed. (Section 508). To suggest, as the Secretary does, that these provisions are not preemptive of State powers is to ignore reality.

Moreover, the Act on its face boldly asserts its preemptive effect. Section 504 directs that the Secretary promulgate and implement a federal program for any State which fails to adopt a State program meeting the Secretary's approval, and that promulgation of such a Federal program "vests the Secretary with exclusive jurisdiction for the regulation and control of surface coal mining and reclamation operations taking place on lands within any State not in compliance

with this Act." Whenever a federal program is promulgated for a State by the Secretary "[A]ny statutes or regulations of such State which are in effect to regulate surface mining and reclamation operations shall . . . be *preempted and superceded* by the Federal program." (Section 504(g)). Emphasis added.

Despite this starkly coercive language the Secretary continues to argue that the States are not compelled to enforce the Act, but are merely *encouraged* to enforce it. The reality is that the only option given to a State is to adopt federally dictated regulatory criteria or reliquish all State authority over surface mining and leave the field to the federal enforcers. In substance, Congress has said to the States "You cannot allow your lands to be used for surface mining unless you comply with the federally mandated terms and conditions, and if you do not accept such terms and conditions the Secretary of the Interior will assume and administer your land use powers." The "choice" which the Secretary contends the Act allows the States is an illusion. Whether a State elects to adopt federally mandated land use policies and enforcement procedures, or abdicates these functions to the Secretary of the Interior, the result is the same—the State's authority to determine the appropriate use of land is subordinated to the federal power. The principles enunciated by the Court in *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1963) make it clear that where it is shown that a federal program involves "weapons of coercion, destroying or impairing the autonomy of the States" Tenth Amendment questions are squarely presented. The Surface Mining Act's provisions leave little room for doubt that they are "weapons of coercion."

THE COMMERCE CLAUSE POWERS OF THE FEDERAL GOVERNMENT DO NOT JUSTIFY FEDERAL REGULATION OF PRIVATE LANDS WITHIN STATE JURISDICTION

Over the past 40 years since its Decision in *United States* v. *Darby,* 312 U.S. 100 (1941), the Court has broadly construed the federal commerce power to cover many activities previously regarded as purely local in nature, but has never held, or even intimated, that land *as such* is subject to regulation under the Commerce Clause. In the relatively few cases in which the subject has been even touched upon the Court has uniformly held that federal land use powers are limited to those which are derived from the Property Clause of Article 4, section 3, Clause 2 of the Constitution, i.e., legislative powers over federally owned lands. See, *Kansas* v. *Colorado,* 206 U.S. 46 (1906); *United States* v. *Arizona,* 295 U.S. 174 (1935); *Kleppe* v. *New Mexico,* 426 U.S. 529 (1976); *California* v. *United States,* 438 U.S. 645 (1978). In *McCready* v. *Virginia,* 94 U.S. 391 (1877) the Court noted that "Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade." 94 U.S. at 396. This premise is as valid today as it was 100 years ago.

Even if it were assumed, however, that the reach of the commerce power extends to land use it would not justify federal usurpation of the historic reserved powers of the States in this field. As noted in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976) "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its plenary powers to tax or to regulate

commerce which are conferred by Article I of the Constitution," 426 U.S. at 842, and "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from expressing the authority in that manner." 426 U.S. at 845. The test in judging whether federal regulation is constitutionally permissible is whether it interferes with a State's "freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852. The Court has recognized as "constitutional policy" that Congress "may not exercise its power in a fashion that impairs the States' integrity or their ability to function in a federal system." *Fry* v. *United States,* 421 U.S. 452 (1975).

The preemptive scheme embodied in Title V of the Surface Mining Act works just such an impairment of State sovereignty. Land use planning is by any measure one of the "integral" functions through which the States can make provision for the orderly development of their natural resources, as well as promoting employment and economic sustenance for their citizens, and revenue sources for essential services furnished through State and local governmental agencies. Because the States are closer to the problems and needs of their local communities and citizens than are the federal bureaus in Washington they are obviously in a better position to make the necessary decisions in these vital areas. What is even more obvious is the fact that it was never the intent of the framers of the Constitution that the central government could override the sovereign powers of the States in such areas.

Gibbons v. *Ogden,* 22 U.S.1, 203 (9 Wheat.) (1824); *Brown* v. *Maryland,* 25 U.S. 419, 444 (12 Wheat.) (1827); *New York* v. *Miln,* 36 U.S. 102.[1] (1837) *Kansas* v. *Colorado,* 206 U.S. 46 (1906).

The rationale advanced in justification for the exercise of the commerce power in this statute hangs on the premise that there are environmental values at stake in the use of land for surface mining, and that the environmental concerns of the federal government must be given precedence over the multitude of economic, social and political priorities which may be advanced by the States. The district courts below correctly perceived, however, that the focus of Title V is on the land itself and not on the commerce aspects of land use, and that the end result is creation of a body of federal police powers which displace the traditional police powers of the States.

Hence, the ultimate question presented is whether the target of the federal Act, i.e. land, can by any valid rationale be held to be in commerce. If land *as land* is not in commerce a Congressional incantation that its use affects interstate commerce cannot serve to bring it within the scope of federal regulatory powers under the commerce clause.

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[1] As the Court noted in *Miln,* "...[I]t is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive." 36 U.S. 139.

A contrary conclusion would open a Pandora's Box which could shatter the structure of the federal system as it now exists, since there is almost no use of land which could not to some extent at least be held to affect interstate commerce, whether such use be agriculture, forestry, industrial plants, warehouses, retail shopping centers, or countless other purposes. In the end, all lands used or having a potential use for any activity affecting commerce become proper subjects for federal land use regulations.

THE FIFTH AMENDMENT ISSUES

Amici believe that the district courts below have properly held that the provisions of Title V of the Surface Mining Act effectively destroy land values, and in their operation and effect deprive the owners of the mineral estates in coal lands of valuable property rights without just compensation and in violation of the due process clause of the Fifth Amendment. While these are issues of grave concern to the States, *amici* will leave to those most directly affected the task of arguing the applicable points of law. *Amici* will simply observe that a severe injustice will be wrought upon their citizens if the guarantees of the Fifth Amendment can be casually overridden by federal legislation of this sort.

CONCLUSION

The constitutional implications of a further expansion of federal regulatory powers into the zone of land use are immense. The Surface Mining Act raises the critical question of whether Congress can effectively amend the Constitution through the simple mechanism of making a legislative finding that the use of land for a particular purpose affects interstate commerce. Such a confiscation of reserved powers is not constitutionally permissible unless the Tenth Amendment has no force and effect in confrontation with the Commerce Clause. For these reasons the decisions of the district courts below should be affirmed.

Respectfully submitted,

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BRIEF OF THE STATES OF ARIZONA, HAWAII, NEVADA, NORTH DAKOTA, OREGON, UTAH, WASHINGTON AND WYOMING AS AMICI CURIAE

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Kleppe v. New Mexico, 426 U.S. 529 (1976) 10

Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842) 5

McCready v. Virginia, 94 U.S. 391 (1877) 10

National League of Cities v. Usery, 426 U.S. 833 (1976) 11

New York v. Miln, 36 U.S. 102 (1837) 12

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 3

Steward Machine Co. v. Davis, 301 U.S. 548 (1937) 8

United States v. Arizona, 295 U.S. 174 (1935) 10

United States v. Darby, 312 U.S. 100 (1941) 10

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Warth v. Seldin, 422 U.S. 490 (1975) 3

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Act of Aug. 3, 1977, § 502, 91 Stat. 468, 30 U.S.C. §1252 7

Act of Aug. 3, 1977, § 503, 91 Stat. 470, 30 U.S.C. §1253 7

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Texts

Gates, P., *History of Public Land Law Development,* (Washington, D.C., 1968) P. 3 5

Jefferson, Thomas, *A Summary View of the Rights of British America of 1774,* (Williamsburg, 1774) reprinted in *The Papers of Thomas Jefferson,* (Princeton: Princeton University Press, 1950), Vol. 1, pp. 121–135. 5

Moynihan, Cornelius J., *Introduction to the Law of Real Property,* (St. Paul: West Publishing Co., 1962) p. 26 6

Comment, *Exclusinary Zoning and a Reluctant Supreme Court,* 13 Wake Forest L. Rev. 107 (1977) 3

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H. Rep. No. 93–197, 93rd Cong., 1st Sess., 1973 p. 61 9

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BRIEF OF THE STATES OF ARIZONA, HAWAII, NEVADA, NORTH DAKOTA, OREGON, UTAH, WASHINGTON AND WYOMING AS AMICI CURIAE

The several States appearing as *amici curiae* herein respectfully urge the Court to affirm the decisions of the respective district courts in Virginia and Indiana holding that Title V of the Federal Surface Mining Control and Reclamation Act of 1977 unconstitutionally interferes with inherent sovereign powers of the States to regulate the use of private non-federal lands within their borders, and with State land-use decisions respecting the development of mineral resources vital to the progress and prosperity of their communities and citizens. The Amici States herein are particularly concerned because substantial quantities of lands subject to the Act are State owned lands. Additionally, the Amici States have within their borders vast quantities of mineral resources which will be subject to the provisions of the Act.

INTEREST OF AMICI CURIAE

The constitutional issues presented in these cases are of critical importance to the States in terms of retaining control over their essential State powers, and their ability to continue to function effectively within a federal system. If the authority to determine the appropriate use of private lands within the States may, by Congressional fiat, be transferred to a federal agency in Washington, an essential element of State sovereignty is effectively destroyed, and long established federal-state relationships will be drastically altered.

From the earliest days of the Republic the individual States and their constitutent counties and municipalities have exercised land use powers, subject only to constitutional limitations upon taking of private property without just compensation and due process of law under the Fourteenth Amendment. *Penn Central Transportation Company v. New York City,* 438 U.S. 104 (1978). Such land use powers have included the promulgation of zoning laws and regulations, enforcement of building codes, granting and terminating permits for operation of mines and quarries, imposition of severance taxes on minerals extraction, exercise of eminent domain, and many related police power functions.

As early as 1909 the city of Boston validly imposed height restriction on its buildings. *Welch v. Swasey,* 214 U.S. 91 (1909). Even before that, it had been decided that local police power extended to regulation of natural resources. *Hudson Water Co. v. McCarter,* 209 U.S. 349 (1908). By 1926, it was decided that communities could control their development through the enactment of zoning ordinances. *Euclid v. Ambler,* 272 U.S. 365 (1926). Following that landmark case, the local zoning power was so well settled that the Supreme Court was able to remain divorced from considering any zoning cases for over 50 years. See 13 Wake Forest L. Rev. 107. When the Court recommenced considering the zoning power in the early 1970's it reaffirmed the principle that zoning is a peculiarly local function.

As noted by this Court in *Warth v. Seldin,* 422 U.S. 490, 508 N. 18 (1975) "[Z]oning laws and their provisions, long considered essential to urban planning, are peculiarly within the province of the State and local legislative authorities."

It hardly needs to be emphasized that the States have an overriding interest in preservation of these traditional governmental functions and are deeply concerned by the federal government's assertion of preemptive power under the Surface Mining act to dictate the land use criteria which a State must adopt and enforce as a precondition to permitting surface mining on lands within the State.

The federal interest to be served in comparison to the States' role in land use planning and regulation appears miniscule. Although the act's Statement of Policy in section 101(f) purports to recognize State primacy "in developing, issuing and enforcing regulations for surface mining and reclamation operations," the actual effect of Title V is quite the opposite, since it provides that unless a State regulatory program conforms in all respects with the standards established by the act and the regulations issued by the Secretary of the Interior the State program is displaced by a federal program enforced and administered by the Secretary. By imposing these requirements on activities within a state, the Act necessarily limits the State's exercise of traditional sovereign perogatives and choices in the determination of the land use policies it will follow.

TITLE V OF THE ACT CONSTITUTES LAND USE LEGISLATION WHICH SUPERSEDES STATE GOVERNMENTAL PROCEDURES FOR LAND USE PLANNING, AND, AS SUCH, USURPS POLICE POWERS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT

Introjection of federal authority into local land use matters is at odds with our history, our traditions and our Constitution.

Local control of land matters in the United States has had an interesting and informative history leading to well

established governmental institutions. Thomas Jefferson outlined his position on land tenure in 1774. He was convinced that the feudal system introduced to England with the Norman Conquest of 1066, which displaced the Saxon system under which individual men could hold their lands in absolute dominion, was unnatural and inappropriate for Virginia. The feudal incidents were too burdensome to be tolerated in the new country. He argued that landholding in America ought to be allodial like the Saxon landholding system. See Thomas Jefferson, *A Summary View Of The Rights Of British America Of 1774.* (Williamsburg, 1774), reprinted in *The Papers Of Thomas Jefferson* (Princeton: Princeton University Press, 1950), Vol. I, pp. 121–135. This view of the ownership of land, based firmly on the teachings of John Locke, were reasserted in the Declaration of Independence, See P. Gates, *History Of Public Land Law Development,* (Washington, D.C., 1968) p. 3.

Prior to the Revolution "Every acre of land in this country was then held mediately or immediately by grants from . . . [the] Crown." *Chisolm v. Georgia,* 2 Dall. (2 U.S.) 419, 470 (1793). "When the revolution took place, the people of each state became themselves sovereign . . . subject only to the rights since surrendered by the Constitution to the general government." *Martin et. al., v. Waddell,* 16 Peters (41 U.S.) 367, 410 (1842). After the Revolution, responsibility was assumed by the states as representatives of the people for issuing land titles and for abolishing or modifying such incidents of feudalism and feudal arrangements as existed and establishing an allodial system of tenure. Lands were then deemed to be held in the tenure of the state as sovereign in place of the crown.

See Cornelius J. Moynihan, *Introduction To The Law Of Real Property,* (St. Paul: West Publishing Co., 1962) p. 26; see also *Wallace v. Harmstad,* 44 Pa. 499, 501 (1863).

It may not now be gainsaid as a general proposition that the States and their citizens collectively enjoy less than complete authority over the privately held lands within the States. To recognize now a centralized federal authority to impose conditions on the use of private lands would be the harbinger of an erosion of State sovereignty that would ultimately lead to a return of centralized land controls which were rejected by our forefathers. Pursuant to the well recognized sovereign authority of the States, police powers in the areas of land use planning and regulation of private lands have traditionally been exercised exclusively by the States. To carve out an exception to the States' plenary authority to accommodate federal regulation of surface mining would open the door to federal regulation of other activities and uses; farming, for instance may be next, and thereafter any of the multitudinous uses which are made of private lands could conceivably be the subject of federal regulation. Based upon well established principles of federalism involving the division of federal-state powers, each of the district courts properly drew a line in the cases before them.

Each of the respective district courts below found, with abundant supporting evidence, that the focus and thrust of the Surface Mining Act is control of the use of land, and that its effect is to preempt the traditional land use powers reserved to the States under the Tenth Amendment. Any doubt as to the preemptive character of the act is quickly dispelled by the plain language of section 503 which provides that a State may not allow private lands

within its jurisdicition to be used for surface coal mining unless it adopts a state law providing for regulation of surface mining and reclamation operations, and imposes sanctions for violations of such regulations, which "shall meet the minimum requirements of this Act." Other sections of Title V prohibit surface mining on various categories of lands, require that a State desiring to retain any enforcement authority under the Act must establish a planning process for designating other land areas as unsuitable for mining in accordance with the specified criteria of the Act, and dictate in great and massive detail the terms and conditions under which a State may grant or renew permits for surface coal mining. (Sections 502, 506, 507, 522.) The Act also deals extensively with permissible post-mining use of lands after mining and reclamation have been completed. (Section 508.) To suggest, as the Secretary does, that these provisions are not preemptive of State powers is to ignore reality.

Moreover, the Act on its face boldly asserts its preemptive effect. Section 504 directs that the Secretary promulgate and implement a federal program for any State which fails to adopt a State program meeting the Scretary's approval, and that promulgation of such a Federal program "vests the Secretary with exclusive jurisdiction for the regulation and control of surface coal mining and reclamation operations taking place on lands within any State not in compliance with this Act." Whenever a federal program is promulgated for a State by the Secretary "[A]ny statutes or regulations of such a State which are in effect to regulate surface mining and reclamation operations shall . . . be *preempted and superseded* by the Federal program." (Section 504(g).) Emphasis added.

Despite this starkly coercive language the Secretary continues to argue that the States are not compelled to enforce the Act, but are merely *encouraged* to enforce it. The reality is that the only option given to a State is to adopt federally dictated regulatory criteria or relinquish all State authority over surface mining and leave the field to the federal enforcers. In substance, Congress has said to the States "You cannot allow your lands to be used for surface mining unless you comply with the federally mandated terms and conditions, and if you do not accept such terms and conditions the Secretary of the Interior will administer your lands." The choice which the Secretary contends the Act allows the States is an illusion. Whether a State elects to adopt federally mandated land use policies and enforcement procedures, or abdicates these functions to the Secretary of the Interior, the result is the same—the State's authority to determine the appropriate use of land is subordinated to the federal power. The principles enunciated by the Court in *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937) make it clear that where it is shown that a federal program involves "weapons of coercion, destroying or impairing the autonomy of the States" Tenth Amendment questions are squarely presented. The Surface Mining Act's provisions leave little room for doubt that they are "weapons of coercion."

Federal control over private land uses has consistently been suspect. Congress, by enacting the Clean Air Act has effectively imposed restrictions on land use which restrict municipal choices. Affected states challenged the restrictions on both statutory and constitutional ground. The Courts of Appeals in the Ninth, Fourth, and D.C. Circuits have invalidated the regulations, relying on statutory

interpretation. The constitutional issues involved were again avoided when one of these cases was reviewed by this Court in *EPA v. Brown,* 431 U.S. 99, 1977). In that case however the government conceded in its brief that regulations requiring states to adopt laws were constitutionally invalid. *Id.* at 103.

In 1973 Congress considered the Land Use Policy and Planning Assistance act and ultimately rejected it. One bill that surfaced, (S268), was designed to encourage land use planning by state and local governments by providing economic incentives. It did not attempt to mandate, require, or allow "Federal planning" or "Federal zoning." Rep. No. 93-197, 93rd Cong., 1st Sess., (1973) at 61. The reason for this was simple: "The Federal Government has no police power to regulate lands within a State which are privately owned or owned by the State. Only the State has constitutional authority to control and regulate these lands." *Id.* at 60. The report went on to recognize that:

> "The States have exercised land use controls for hundreds of years in one form or another. It was only in the early part of the 20th Century, however, that the States began to do so in a broad and general way. This came with the adoption of model State laws which generally delegated zoning authority—a part of the State's inherent police powers—to units of local government. The purpose of this delegation of police power authority to counties, cities, and other units of local government was to enable them to develop master plans, to zone for permissible uses and to establish local planning bodies. *Id.*

Prior to the development of a statutory framework for land use planning and control, the report noted, injured parties sought their remedies through the common law

doctrines of nuisance and trespass. Senator Helms correctly stated the fundamental consideration on the floor of the Senate: "The great body of law concerning land use control has developed through our state courts where it properly belongs." 119 Cong. Rec. 20630 (1973).

The Amici States submit that the positive law emanating from Congressional statutes and federal regulations, when imposed upon local land use concerns without reference to the societal expectancies arising from the customs, traditions, and needs of the locality, is inadequate to accommodate the myriad competing interests in a fashion that State courts applying State law have traditionally accomplished.

THE COMMERCE CLAUSE POWERS OF THE FEDERAL GOVERNMENT DO NOT JUSTIFY FEDERAL REGULATION OF PRIVATE LANDS WITHIN STATE JURISDICTION

Over the past 40 years since its decision in *United States v. Darby,* 312 U.S. 100 (1941), the Court has broadly construed the federal commerce power to cover many activities previously regarded as purely local in nature, but has never held, or even intimated, that land *as such* is subject to regulation under the Commerce Clause. In the relatively few cases in which the subject has been even touched upon the Court has uniformly held that federal land use powers are limited to those which are derived from the Property Clause of Article 4, Section 3, Clause 2 of the Constitution, i.e., legislative powers over federally owned lands. See, *Kansas v. Colorado,* 206 U.S. 46 (1907); *United States v. Arizona,* 295 U.S. 174 (1935); *Kleppe v. New Mexico,* 426 U.S. 529 (1976); *California v. United States,* 438 U.S. 645 (1978). In *McCready v. Virginia,* 94 U.S. 391 (1877) the Court noted that "Commerce has nothing to do with land while producing, but only with the product after

it has become the subject of trade." 94 U.S. at 396. This premise is as valid today as it was 100 years ago.

Even if it were assumed, however, that the reach of the commerce power extends to land use it would not justify federal usurpation of the historic reserved powers of the States in this field. As noted in *National League of Cities v. Usery,* 426 U.S. 833 (1976) "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Article I of the Constitution," 426 U.S. at 842, and "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from expressing the authority in that manner." 426 U.S. at 845. The test in judging whether federal regulation is constituionally permissible is whether is interferes with a State's "freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852. The Court has recognized as "constitutional policy" that Congress "may not exercise its power in a fashion that impairs the States' integrity or their ability to function in a federal system." *Fry v. United States,* 421 U.S. 542 (1975).

The preemptive scheme embodied in Title V of the Surface Mining Act works just such an impairment of State sovereignty. Land use planning is by any measure one of the "integral" functions through which the States can make provision for the orderly development of their natural resources, as well as promoting employment and economic sustenance for their citizens, and revenue sources

for essential services furnished through State and local governmental agencies. Because the States are closer to the problems and needs of their local communities and citizens than are the federal bureaus in Washington they are obviously in a better position to make the necessary decisions in these vital areas. What is even more obvious is the fact that it was never the intent of the framers of the Constitution that the central government could override the sovereign powers of the States in such areas. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 203 (1827); *New York v. Miln,* 36 U.S.[1] 102 (1837) *Kansas v. Colorado,* 206 U.S. 46 (1907).

The rationale advanced in justification for the exercise of the commerce power in this statute hangs on the premise that there are environmental values at stake in the use of land for surface mining, and that the environmental concerns of the federal government must be given precedence over the multitude of economic, social and political priorities which may be advanced by the States. The district courts below correctly perceived, however, that the focus of Title V is on the land itself and not on the commerce aspects of land use, and that the end result is creation of a body of federal police powers which displaces the traditional police powers of the States.

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[1]As the Court noted in Miln: ". . . [I]t is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner if its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive." 36 U.S. 138.

Hence, the ultimate question presented is whether the target of the federal Act, i.e. land, can by any valid rationale be held to be in commerce. If land *as land* is not in commerce a Congressional incantation that its use affects interstate commerce cannot serve to bring it within the scope of federal regulatory powers under the commerce clause.

A contrary conclusion would open a Pandora's Box which could shatter the structure of the federal system as it now exists, since there is almost no use of land which could not to some extent at least be held to affect interstate commerce, whether such use be agriculture, forestry, industrial plants, warehouses, retail shopping centers, or countless other purposes. In the end, all lands used or having a potential use for any activity affecting commerce become proper subjects for federal land use regulations.

THE FIFTH AMENDMENT ISSUES

Amici believe that the district court below have properly held that the provisions of Title V of the Surface Mining Act effectively destroy land values, and in their operation and effect deprive the owners of the mineral estates in coal lands of valuable property rights without just compensation and in violation of the due process clause of the Fifth Amendment. While these are issues of grave concern to the States, *Amici* will leave to those most directly affected the task of arguing the applicable points of law. *Amici* will simply observe that a severe injustice will be wrought upon their citizens if the guarantees of the Fifth Amendment can be casually overridden by federal legislation of this sort.

CONCLUSION

The constitutional implications of a further expansion of federal regulatory powers into the zone of land use are immense. The Surface Mining Act raises the critical question of whether Congress can effectively amend the Constitution through the simple mechanism of making a legislative finding that the use of land for a particular purpose affects interstate commerce. Such a confiscation of reserved powers is not constitutionally permissible unless the Tenth Amendment has no force and effect in confrontation with the Commerce Clause. For these reasons the decisions of the district courts below should be affirmed.

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No. 79-1538

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CECIL D. ANDRUS, Secretary of the Interior, - Appellant

versus

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., Et Al., - Appellees

On Appeal From the United States District Court
For the Western District of Virginia

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES' POSITION BY COAL OPERATORS AND ASSOCIATES, INC.

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QUESTIONS PRESENTED

1. Whether the provisions of the Surface Mining Control and Reclamation Act of 1977, Section 515(b) and (d), 30 U.S.C. § 1265(b) and (d) (1979), requiring mined land to be restored to its approximate original contour with all highwalls eliminated are violative of the taking clause of the fifth amendment to the United States Constitution.

2. Whether the requirement of Section 518(c), 30 U.S.C. § 1268(c) (1979), that civil penalties assessed under the Act be prepaid as a pre-condition of a hearing before an administrative law judge is violative of the due process clause of the fifth amendment to the United States Constitution.

3. Whether the provisions of Section 521, 30 U.S.C. § 1271 (1979), authorizing summary orders to cease mining without any opportunity for a pre-cessation hearing are violative of the due process clause of the fifth amendment to the United States Constitution.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1538

CECIL D. ANDRUS, Secretary of the Interior, - *Appellant*

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., Et Al. - - - - *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES' POSITION BY COAL OPERATORS AND ASSOCIATES, INC.

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36.2, Coal Operators and Associates, Inc., file this brief as Amicus Curiae in support of Appellees. Counsel for all parties have consented to the filing of this brief and letters to that effect from counsel for all parties have been filed with the Clerk of the Supreme Court.

Coal Operators and Associates, Inc. (hereinafter referred to as C.O.A.), is a non-profit corporation chartered under the laws of Kentucky. Although it is in form a corporation, C.O.A. is an association organized to promote the views and interests of its members. Members of C.O.A.

are 266 in number and include persons and corporations in Pike County, Kentucky, who are engaged in the active mining of coal both by surface and underground methods. Members also include persons and corporations who are dependent for their economic livelihood on the mining industry because they provide support services of all sorts for the industry. Members also include persons and corporations who are indirectly dependent upon the mining industry because they serve the needs of those employed in mining.

Pike County, Kentucky, is the leading county in the United States in terms of coal production. In 1979, Pike County was responsible for the production of some twenty-three million tons of coal. This was one-seventh of the total production for the Commonwealth of Kentucky. During the three-year fiscal period ending in 1979, severance taxes from the mining of coal in Pike County brought the Commonwealth a revenue of more than seventy-five million dollars. A significant percentage of that money was returned to Pike County by the Commonwealth under the severance tax sharing provisions of Kentucky law. Members of C.O.A. were responsible for the production of one-half of the tonnages and tax revenues just described. More than four thousand persons in and around Pike County depend directly on the C.O.A. producing members for employment. An attempt to measure the effect of C.O.A. and the coal industry on Pike County in terms of indirect effects would be fruitless. The coal industry *is* the ecomonic base of the county.

Being comprised of those who depend directly and indirectly on the mining of coal for their economic well-being, C.O.A. is directly affected by the regulation of the surface effects of coal mining imposed by the Surface Mining Con-

trol and Reclamation Act of 1917, § 101, 30 U.S.C. § 1201 et seq. (1979) [hereinafter cited as "the Act"]. It being the unanimous feeling of the members of C.O.A. that some features of the Act are so oppressive and unfair as to be unconstitutional, C.O.A. has previously contested portions of the Act in a lawsuit similar in nature to the one under appeal herein. *Clay County Independent Coal Operators Ass'n* v. *Andrus,* No. 80-8 (E.D. Ky., 1980). That action has been stayed by U. S. District Judge Eugene Siler pending the outcome of the appeal in the present case. Having presented arguments in *Clay County* which are slightly different from those previously advanced in regard to legal issues central to both *Clay County* and the present case, it is the desire of C.O.A. to advance those arguments in support of Appellees as Amicus Curiae.

SUMMARY OF ARGUMENT

I. *The requirement of the Act that all mined lands be restored to their approximate original contour with all highwalls eliminated is invalid as a taking of property without just compensation.* In the steep slope areas of Appalachia, it is physically impossible to restore to its approximate original contour in a stable fashion land which has been contour stripped. Since there is much coal which can only be mined by the contour strip method, mining of that coal is effectively precluded by the requirement that the land be returned to contour. Such coal has no economic value at all if it cannot be mined. The mineral rights in this coal have been taken without just compensation as a result of the enactment of the provisions of Section 515(b)(3), 30 U.S.C. § 1265(b)(3) (1979) and Section 515(d)(2), 30 U.S.C. § 1265(d)(2)(1979) in violation of the taking clause

of the fifth amendment. *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922). Even if such mining were physically possible, economic considerations would preclude the taking of coal by either a second contour cut or by the augering method on an area restored to contour. Such economic preclusion is as much a taking of the mineral rights as if the Act prohibited such contour mining. *Id.* The requirement of restoration to contour is also a taking of the rights of surface owners of mined lands in that variance procedures are meaningless in steep slope areas and economic value of restored land is miniscule when compared with alternative post-mining land uses.

II. *The requirement of Section 518(c), 30 U.S.C. §1268 (c) (1979) that assessed penalties be prepaid as a prior condition for a hearing violates procedural due process.* Unless the facts fall within well-recognized exceptional circumstances, any significant taking of property must be preceded by an opportunity for a due process sufficient hearing. *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969). The requirement of prepayment of a proposed penalty in a venture capital business such as mining deprives the property owner of a property right because it unduly restricts the usage of the property even though interest will be paid on the amount in the event of a successful contest. Neither the opportunity for written input into the assessment process nor the ability to secure an informal conference with employees of the enforcement agency provides a sufficient pre-deprivation hearing. Such a deprivation violates the due process clause of the fifth amendment. The requirement of prepayment is also unduly burdensome on the right to be heard.

III. *The provisions of Section 521, 30 U.S.C. §1271 (1979) authorizing summary cessation orders are violative of due process of law.* Cessation orders under the Act fall into two categories: (1) cessation orders for failure to abate an alleged violation under Section 521(a)(3), 30 U.S.C. §1271(a)(3) (1979); and (2) cessation orders for imminent danger to the environment or to the safety and health of the public under Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979). It is essential to distinguish between the two. All cessation orders involve the deprivation of the property right to continue mining and this deprivation occurs without a prior hearing. Failure to abate cessation orders under Section 521(a)(3), are simply enforcement tools and do not fall under any of the exceptional circumstances provisions in which such summary action is consistent with procedural due process under *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). Failure to abate cessation orders are further violative of due process as being unduly burdensome on the right to be heard and are in fact punitive in nature. *Ex Parte Young,* 209 U.S. 123 (1907). Cessation orders for imminent environmental harm are violative of procedural due process because none of the case law supporting such an extraordinary power under the rational of *Fuentes* has upheld such a power in regard to a concept as nebulous as imminent danger to the environment. The power to grant such cessation orders for imminent environmental harm is further violative of due process because of the lack of any definition of the terms in the Act itself. Such definitions are furnished in implementing regulations, but this cannot prevent the unconstitutionality of the Act since the regulations themselves are unconstitutionally vague.

ARGUMENT

I.

THE REQUIREMENT OF THE ACT THAT ALL MINED LANDS BE RESTORED TO THEIR APPROXIMATE ORIGINAL CONTOUR WITH ALL HIGHWALLS ELIMINATED IS INVALID AS A TAKING OF PROPERTY WITHOUT JUST COMPENSATION.

Members of Coal Operators and Associates have a variety of interests in the mineral rights to coal located under steep slopes in Eastern Kentucky. Some members are owners in fee simple of land located in such areas. Other members are owners of the mineral rights to coal underlying such land. Still others are lessees holding the right to mine coal in such areas and to derive a profit from such mining. All three categories of members are holders of a property right in the mineral interests. To the extent that the ability to mine the coal is impaired by provisions of the Act, the property rights of these owners are impaired. These mineral rights are of absolutely no value if the coal cannot be mined.

A. Approximate Original Contour and Highwall Elimination Effect a Taking of Mineral Rights in Steep Slope Areas Where Such Restoration is a Physical Impossibility.

It was found from the evidence presented to Judge Williams that in steep slope areas of Virginia which are virtually identical to Pike County, Kentucky, the requirement of the Act that land be restored to approximate original contour was impossible to obey. *Virginia Surface Mining and Reclamation Assoc.* v. *Andrus,* 483 F. Supp.

425, 441 (W.D. Va., 1980), The Act absolutely requires that all mined land be restored to approximate original contour with all highwalls eliminated. Section 515(b)(3), 30 U.S.C. §1265(b)(3) (1979), and Section 515(d)(2), 30 U.S.C. §1265(d)(2) (1979). Put simply, the requirement is impossible to obey because the slopes involved are too steep for material to be restored to approximate original contour in a stable fashion. Pieces of broken rock cannot be restored to solid rock. It may be mandated by act of Congress and the regulations of the Office of Surface Mining [hereinafter "O.S.M."] that the restored material shall stay in place, but the law of gravity dictates otherwise. Faced with that dilemma, coal operators will not mine by the contour method in steep slope areas because the responsibility of restoration to contour cannot be met.

The problems encountered when mining in steep slope areas as a result of the restoration to contour requirement are not simply ones of economics. No matter how much money a person might spend or how carefully the mining might be done, the restored material will not be stable if placed in the manner dictated by the Act and so the performance standards required of an operator cannot be met. T.R. 377-410, 674-677, 840-844, 850-860. This means that large amounts of coal in which persons such as C. O. A. have a property right will not be mined so long as the contour requirement remains. T.R. 377-410, 674-77, 840-850. Although some of the coal may be mined by other methods such as deep-mining or mountaintop removal, vast reserves of the coal in Pike County and in Appalachia generally cannot be mined by any method other than that of contour mining. T.R. 771, 2540.

That coal which cannot be mined by any method other than contour mining and which cannot be mined by the

contour mining method due to the approximate original contour requirement has been taken from its owners as surely as if the United States had dug the coal from the ground and burned it. Such a deprivation of a property right by the Act without the payment of just compensation to the property owners is violative of the fifth amendment.

The Court has long struggled with the question of when a legislative scheme intrudes upon property rights to such a degree as to effect a taking of the property. A central case in the area of taking as it relates to coal mining is the landmark decision of Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922). As was observed in that case: "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414. Since there is a level of economic burden which will effect a taking of coal interests, it clearly follows that any legislative scheme which has the practical effect of making it physically impossible to mine coal must also be a taking.

Although there have been reservations expressed in recent years as to the continued viability of *Mahon,* there would appear from recent Supreme Court treatment of the case to be no basis to doubt its continued value. This Court has cited *Mahon* with approval in its three most recent decisions involving the taking and just compensation issue. *Penn Central Transportation Co.* v. *New York City,* 438 U. S. 104 (1978); *Andrus* v. *Allard,* 444 U. S. 51 (1979); *Kaiser Aetna* v. *United States,* 444 U. S. 164 (1979). Although the cases of *Penn Central* and *Allard* have taken very restrictive views of what constitutes a taking of property, neither casts any doubt on the basic premise that it is

possible for a legislative act to so restrict property rights that a taking has been effected. That such a taking is still possible is evident from the result in *Kaiser Aetna.* The facts in *Penn Central* and *Allard* point out exactly why a taking has occurred due to the requirement of restoration to contour. In both *Penn Central* and *Allard* the property owners were left with some use of their property. In *Penn Central,* the usage which was left of Grand Central Station was not what its owners perceived to be its optimum economic use but there was an economic value left in the property nevertheless. As the Court noted in *Allard,* a taking has not occurred simply because one strand of property rights has been affected. The property value must be viewed in its entirety. *Andrus* v. *Allard,* 444 U. S. at 65-66. From the facts in *Allard,* it would appear that a property owner left with even the most minimal economic use for his property would not be deemed to have been the victim of a taking.

However, persons holding property interests in coal reserves lying under steep slopes as in Pike County have been deprived absolutely of their property right. Since the coal cannot be mined it has no economic use left. The only value of coal, as stated in *Mahon,* is in its mining and sale. Congress may choose to take this property if reasonable compensation is paid to the private property owners. Unless and until that payment is made, it must be held that the requirement of restoration to approximate original contour is an unconstitutional taking of private property without compensation and hence violates the fifth amendment.

B. Approximate Original Contour and Highwall Elimination Effect a Taking of Mineral Rights Which Could Only be Mined by the Taking of a Second Contour Mining Cut in the Future.

When a contour mining cut is taken to remove coal in an existing mining operation, the entire coal seam running through the mountain is not removed. The amount of overburden, or spoil, which may be removed to expose a coal seam is a function of economics. It is only economically feasible to remove so much overburden when mining coal. The economics are dictated by the cost of moving the overburden and the value of the coal. The deeper the cut, as measured by the height of the highwall, the greater the volume of overburden necessary to be removed in order to recover a ton of coal. Due to the steepness of the slope, the amount of overburden increases at a drastic rate while the thickness of the coal seam remains constant. The dramatic rise in the ratio of overburden to coal removed is simply a matter of the geometry of a right triangle.

The common practice of the mining industry in the past has been to leave a highwall and a bench after the removal of coal by the contour mining method. When the price of coal increases, or the cost of moving overburden decreases, more coal from the previously mined seam may be removed by the taking of a second contour cut on the previously benched area. It is also common practice in order to maximize coal recovery to remove more coal from a previously mined seam by the process known as augering.

The approximate original contour requirement eliminates altogether as being economically feasible the potential to take coal by the second cut or augering methods. While there may be a time when the economics of the

industry will allow the taking of undisturbed overburden to mine the remaining coal, there will never be a time when it will be economically possible to remove the remaining overburden plus the overburden from the first cut which will have been restored to approximate original contour as required by the Act. The only thing which makes it uneconomical to take a second cut is the approximate original contour requirement of the Act. As was noted in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 414 (1922), a provision which makes it "commercially impracticable" to mine coal has the effect of a taking of the mineral rights.

In addition to the economic infeasibility of removal of restored material to take a second cut, such removal may not be physically possible. The restored material, as found by the Court below, will not have the same stability that original materials have. T.R. 637-639, 2618-2625, 2665-2670. It is therefore a matter of some doubt as to whether heavy equipment such as that used in taking a contour mining cut will ever be able to work on a restored slope. It is further doubtful that such work can be done in a safe manner. In that case, the second cut minerals have been taken because they have been forever sealed away. Such a result has the effect of causing a taking and comes directly from the requirement of restoration to approximate original contour.

C. Approximate Original Contour and Highwall Elimination Effect a Taking of the Rights of Surface Owners Because They Unconstitutionally Diminish the Value of the Post-Mining Land Use.

The requirement of the Act that all mined lands be restored to approximate original contour is an absolute condition in steep slope areas. Although the Act does provide for a variance procedure from approximate original contour

in steep slope areas, the Act does not allow a variance from the requirement of highwall elimination. Section 515(e)(1) and (2), 30 U.S.C. § 1265(e)(1) and (2) (1979). The stability of the overburden materials used to eliminate a highwall is dictated by the laws of nature. The law of gravity and the physical characteristics (cohesiveness and compactability) of the materials used to cover the highwall establish the maximums for restoration work. In areas of steep slopes, the physical realities of restoration to eliminate the highwall will result in no flat land being left from the previously benched area despite the existence of an approximate original contour variance.

Without question, flat land in the mountainous areas of Appalachia is of tremendously greater value than sloped woodland. T.R. 696-709, 843-844. The inability of the landowner to be left with the more valuable land is a direct result of the inflexible requirement of the Act that all highwalls be eliminated. It is true that a very great diminution in the value in property can take place without reaching the level of an unconstitutional taking of the property. *Andrus* v. *Allard,* 444 U. S. 51 (1979). Yet the continued references with favor to *Mahon* in both *Allard* and *Penn Central* can only mean that there is a level of economic impairment which will be sufficient to effect a taking. The District Court below correctly found that such an impairment had taken place in regard to the post-mining configuration of land when all highwalls had to be eliminated.

II.

THE REQUIREMENT OF SECTION 518(c), 30 U.S.C. §1268(c) (1979) THAT ASSESSED PENALTIES BE PREPAID AS A PRIOR CONDITION FOR A HEARING VIOLATES PROCEDURAL DUE PROCESS.

Persons who are assessed penalties for violations alleged by O.S.M. are required by Section 518(c), 30 U.S.C. § 1268(c) (1979), to pay the full amount of such assessment into an escrow account controlled by O.S.M. before being entitled to a hearing before an administrative law judge concerning the validity of the assessment. Although there is a provision under Section 525(a)(1), 30 U.S.C. § 1275(a)(1) (1979), by which a hearing can be had without prepayment to contest the fact of the violation itself, there is no allowance under the Act for a contest of the amount assessed unless such prepayment has been made. Such pre-hearing deprivation of property is violative of procedural due process under the fifth amendment.

No aspect of procedural due process is more basic than the right to be heard. In *Windsor* v. *McVeigh*, 93 U. S. 274 (1876), Mr. Justice Fields observed concerning one of the most unpopular fact patterns of that era:

> Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. . . . A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all. . . . It would be like saying to a party, Appear and you shall be heard; and when he has appeared saying, Your appearance shall not be recognized and you shall not be heard. *Id.* at 277-78.

In *Windsor*, the Court struck down a lower court decision which had disallowed the appearance of a Con-

federate citizen. The appearance denial would have been no more acceptable had it been based on the failure of the Confederate citizen to pay to be heard. Because there are those in every age who would make Confederates of the unpopular, the Court has steadfastly maintained that "persons forced to settle their claims of right and duty must be given a meaningful opportunity to be heard". *Boddie* v. *Connecticut,* 401 U. S. 371, 377 (1971).

Any significant taking of property must be preceded by an opportunity for a hearing. *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969). Although the Act provides that the funds escrowed will be repaid with interest at the prevailing Department of Treasury rate in the event of a successful contest of the assessment, the prepayment requirement nevertheless constitutes a deprivation of a property right. It is settled that use rights to property are protected by the *Sniadach* requirement. *Fuentes* v. *Shevin,* 407 U. S. 67 (1972). Thusly, the right to use the money prepaid into the escrow account during the pendency of the hearing is a protected right. Even though the operator is paid interest on his escrowed monies if he is successful at the hearing, such interest payment is inadequate because the earning of interest is only one of the usages of the funds open but for the prepayment requirement. The miner members of C.O.A., like other applicants for a hearing under the Act, are engaged in a venture capital business. Their ability to engage in that business is impaired by the prepayment requirement in view of the fact that some proposed assessments of O.S.M. have exceeded a million dollars. The prepayment requirement deprives an applicant of his choice as to how the funds are to be used pending an adjudication that the penalty is

proper. That deprivation of choice is within the protection of *Sniadach* and *Fuentes*.

The basic protections of *Sniadach* and *Fuentes* have been reaffirmed in the most recent case in the procedural due process area, *North Georgia Finishing* v. *DiChem Inc.*, 419 U. S. 601 (1975). While it is true that this line of procedural due process cases arises from the constraints placed upon actions of the States by the due process clause of the fourteenth amendment, the procedural requirement of a meaningful opportunity to be heard is equally applicable against the federal government through the due process clause of the fifth amendment. *Windsor* v. *McVeigh*, 93 U. S. 274 (1876). Neither is it significant that the persons deprived of property in the *Sniadach* line of cases were defendants while the persons deprived by the prepayment requirement are applicants for a hearing and analogous to plaintiffs. Failure of the operator to contest and prepay the proposed assessment in a timely manner will result under Section 526, 30 U.S.C. § 1276 (1979), in a final order which will then be enforced against the operator through the judicial process without further opportunity to contest the merits of the assessment. In view of those facts, "[r]esort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of a defendant called upon to defend his interest in court." *Boddie*, 401 U. S. at 376.

Without prepayment, there is no provision under the Act for any hearing sufficient in form to satisfy due process in regard to a proposed assessment for an alleged violation by an operator. It is possible without prepayment, for an operator to secure an informal conference with O.S.M. regarding the proposed assessment. 30 C.F.R. § 845.18 (1979). It is also possible, without prepayment, for an

operator to have written input in the assessment process. 30 C.F.R. § 845.17 (1979). As has been indicated in *Mathews* v. *Eldridge,* 424 U. S. 319 (1976), it is difficult to generalize about the exact form which a hearing must take in order to satisfy due process. While the pre-deprivation procedures of the Social Security Administration were held not to violate due process in *Mathews,* a comparison of the facts in that case with the procedures used by O.S.M. reveals significant differences.

Procedural due process is violated when a deprivation of a property right is preceded by a hearing process as meaningless as that afforded by O.S.M. The result in *Mathews* was tailor-made for the agency involved and to the procedures used prior to deprivations of property rights by that agency. The decision involved in a proposed assessment hearing is fundamentally different from that being made in a Social Security disability benefits termination case. In *Mathews,* the Court noted that a termination case was a "sharply focused and easily documented decision". *Id.* at 343. Such a determination was based on "routine, standard, and unbiased medical reports by physician specialists." *Id.* at 344. In contrast to that type of decision, assessments under the Act are highly subjective matters about which reasonable persons could disagree. The assessments are in fact calculated in Washington, D.C., by O.S.M. staff personnel who have not seen the mine-site and who must rely solely on written reports from O.S.M. field inspectors. The highly subjective nature of the decision is also the key to why a written submission by a coal operator prior to the assessment is not a satisfactory protection for the operator. Due to the nature of a termination case, it was noted in *Mathews* that the "spector of questionable credibility and veracity is not present".

Id. The assessment process is inherently subjective due to the various factors which must be considered under the mandate of Section 518(a), 30 U.S.C. § 1268(a) (1979). Determinations such as the seriousness of potential or actual damage to the environment cannot be said to be the same sort of unbiased determinations made by physicians in the termination case and upheld in *Mathews.* Under the Act, the original determination is made by an employee of the enforcement agency and the review at the informal conference is done by another employee of that same agency. What was present in *Mathews* is exactly what operators lack under the Act — an opportunity to have the assessment determination made by an unbiased party. In view of that lack of a sufficient hearing prior to the significant property deprivation, the prepayment requirement of Section 518(c), 30 U.S.C. § 1268(c) (1979), is violative of procedural due process.

Even aside from the pre-hearing deprivation aspect of the prepayment requirement, the provision is violative of procedural due process because it is an unreasonable burden on the process of being heard. As the states began to regulate industries at the turn of this century, legislation imposing such regulation often contained provisions making it difficult or expensive for the regulated industries to dispute the regulatory process. Such burdens were all the more imposing since they predated the availability of declaratory judgment procedures. The only means of challenge was by disobedience to the regulatory scheme and defense of the ensuing prosecution. Even that technique will not avail a coal operator since there will never be a hearing on the merits of a proposed assessment unless prepayment is made. In *Cotting* v. *Kansas City Stockyards Co.,* 183 U. S. 79 (1901), the Court expressed doubts about

the validity of a legislative scheme which "burdens any challenge thereof in the court". *Id.* at 100. Congress has burdened any attempt by an operator to contest the amount of a civil penalty assessed against him. The practice of burdening such opportunity to contest was struck down in *Ex Parte Young,* 209 U. S. 123 (1907), and *Wadley Southern Ry.* v. *Georgia,* 235 U. S. 651 (1915). Such tactics of intimidation seem to have been discontinued by all levels of government until revived by Congress in the prepayment provisions of Section 518(c), 30 U.S.C. § 1268(c) (1979).

The procedural due process rights of coal operators are violated by the prepayment requirement in that access to the hearing before a neutral judge is unduly restricted. Those who pay to overcome that obstacle are deprived of use rights in their property prior to a sufficient hearing and so are deprived of procedural due process rights. For those reasons, the provisions of Section 518(c), 30 U.S.C. § 1268(c) (1979), as they require prepayment of proposed civil penalty assessments are unconstitutional.

III.

THE PROVISIONS OF SECTION 521, 30 U.S.C. §1271 (1979), AUTHORIZING SUMMARY CESSATION ORDERS ARE VIOLATIVE OF DUE PROCESS OF LAW.

A. The Requirement of Section 521(a)(3), 30 U.S.C. §1271(a)(3) (1979), for Issuance of a Cessation Order for Failure to Abate Violations is an Infringement Upon Procedural Due Process.

The Act provides that upon the finding of an alleged violation by a federal inspector, the inspector is required

to write a notice of violation, with a period specified therein during which the alleged violation is to be abated. If the alleged violation is not abated during the specified time, the inspector is required to issue a cessation order to the operator. Section 521(a)(3), 30 U.S.C. § 1271(a)(3) (1979). The cessation order issued under this subsection must be carefully distinguished from those issued under the authority of Section 521(a)(2), 30 U.S.C. § 1271(a)(2) (1979). Orders issued under the latter subsection are issued for imminent danger to the public or the environment; failure to abate cessation orders issued under the former section are simply enforcement tools. The cessation order for failure to abate is by definition not utilized in cases of imminent danger. This very important distinction was not noticed by Judge Williams. *Virginia Surface Mining and Reclamation Assoc.* v. *Andrus*, 483 F. Supp. at 446-47. The distinction also was overlooked by Judge Flannery in *In Re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1319 n. 18 (D.D.C. 1979). It is essential that the two types of orders be distinguished because they are used in fundamentally different situations and involve fundamentally different constitutional questions.

As has been set forth in Part II, a fundamental requirement of procedural due process is the right to be heard *before* any significant deprivation of property occurs. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Mitchell* v. *W. T. Grant*, 416 U. S. 600 (1974); *North Georgia Finishing* v. *DiChem Inc.*, 419 U. S. 601 (1975). A cessation order affects the property right of continuing to mine. Such an order effectively takes that property right because it requires "cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation".

Section 521(a)(3), 30 U.S.C. § 1271(a)(3) (1979). A hearing is available to the operator after the issuance of the cessation order, but during the interim period the operator is forced to cease operations as ordered. The procedural due process cases from *Sniadach* to *DiChem* indicate that the existence of a post-deprivation hearing process is not sufficient. Except for extraordinary situations, the requirement of procedural due process is that all deprivations of property must be preceded by an opportunity for a hearing. Pre-seizure hearings are the norm; post-seizure hearings are allowed only as an exception.

As indicated in *Fuentes,* to be an extraordinary situation and hence exempt from the pre-seizure hearing requirement, three criteria had to be met. To paraphrase those requirements: (1) the seizure must be directly necessary to secure an important governmental interest; (2) there must be a special need for very prompt action; and (3) the government must maintain a verty strict control over its monopoly of legitimate force. *Fuentes,* 407 U. S. at 91. The element which is lacking in the issuance of a cessation order for failure to abate a violation is the need for very prompt action. Very prompt action is needed when something is imminently dangerous, *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594 (1950). Such action is needed when property might be spirited away or lost. *Phillips* v. *Commissioner of Internal Revenue,* 283 U. S. 589 (1931); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U. S. 663 (1974). If an imminent danger was involved in a mining operation, a cessation order would issue under Section 521(a)(2), 30 U.S.C. § 1271(a)(2) (1979), not under the failure to abate provisions of Section 521(a)(3), 30 U.S.C. § 1271(a)(3) (1979). If the situation was dangerous, an abatement period would not have been specified in the first place. It

would follow logically that a continuation of the violation will not in and of itself have created an imminent danger, but in the event that it did there would still be the power to issue an imminent danger cessation order. Cessation orders for failure to abate would seem by their very definition not to involve any need for very prompt action. Lacking such a need, procedural due process requires that a hearing be afforded prior to the issuance of the order.

In addition to the fact that cessation orders issued pursuant to Section 521(a)(3), 30 U.S.C. § 1271(a)(3) (1979), are violative of procedural due process for failure to afford a pre-deprivation hearing, the authorization for the issuance of such orders is violative of procedural due process because it impermissibly deters operators from contesting the validity of the alleged violation. An operator who has been accused of a violation may contest the existence of the violation. Section 525(a)(1), 30 U.S.C. § 1275(a)(1) (1979). At the expiration of the abatement period, it is required by Section 521(a)(3), 30 U.S.C. § 1271(a)(3) (1979) that a cessation order be issued. Such issuance may only be avoided by a determination of the Secretary pursuant to Section 518(h), 30 U.S.C. § 1268(h) (1979), that the abatement period not end until the completion of the contest on the existence of the violation. Absent an exercise of discretion by the Secretary, a failure to abate cessation order *must* be issued even if the period runs out during a contest by the operator.

The issuance of a cessation order materially changes the on-going contest between O.S.M. and the operator as to the existence of the violation. Penalties *must* be assessed whenever a cessation order is issued, unless the order were later found invalid. Section 518(a), 30 U.S.C. §1268(a) (1979). The minimum penalty per day for any continuing

violation after the issuance of a cessation order is $750.00. Section 518(h), 30 U.S.C. §1268(h) (1979). Such a cessation order has further adverse effects in that for any future violations an operator will, under the O.S.M. penalty system, be assessed a significantly greater penalty for those violations than he would be for an ordinary violation. 30 C.F.R. §845.13(b)(1) (1979).

An operator who has been issued a notice of violation is by virtue of the existence of the requirements of Section 521(a)(3), 30 U.S.C. §1271(a)(3) (1979), placed in a very precarious position. He may contest the validity of the alleged violation, but runs the risk that while exercising that option his time period for abatement will expire. When the time expires, the operator will be issued a cessation order. Such order markedly increases the assessed penalty and will have the same effect on all future penalty calculations. The only other option which the operator has is to abate the alleged violation even though he feels the matter in question is not really a violation.

The placing of an operator in a position in which he must submit to what he feels is an invalid order or run the risk of greatly increased penalties and more serious consequences by litigating his claim is violative of due process. As was noted in *Wadley Southern Ry.* v. *Georgia,* 235 U. S. 651, 662 (1915): "If a statute could constitutionally impose heavy penalties for violations of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment. . . ." In the landmark case of *Ex Parte Young,* 209 U. S. 123 (1907), Mr. Justice Peckham observed:

> It may therefore be said that when the penalties for disobedience are by fines so enormous . . . as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights. *Id.* at 147.

This is exactly the effect of the cessation order for failure to abate. By its mandatory penalty, by the high dollar amount of that penalty, and by its higher point value for future violations, the availability of the order serves to deter persons from contesting the allegations of a federal inspector concerning an alleged violation.

Failure to abate cessation orders as authorized by Section 521(a)(3), 30 U.S.C. §1271(a)(3) (1979), are violative of procedural due process for two reasons. First, such orders cause a deprivation of property without a prior hearing. Second, such orders further have the effect of forcing operators to comply with the remedial provisions of notices of violation rather than contesting the validity of the notice itself. The imposition of a barrier to a person's option of contesting the existence of the violation itself is violative of procedural due process.

B. The Provision of Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), Allowing Issuance of Cessation Orders for Imminent Environmental Harm is Violative of Procedural Due Process.

The provisions of Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), authorize O.S.M. to issue summary cessation orders without hearings in two separate situations of imminent danger. The first is in cases of imminent danger to the health or safety of the public; the second is in cases of

imminent environmental harm. Without distinguishing between the two situations, the power granted under this subsection of the Act has been upheld as constitutionally valid by Judge Flannery in *In Re Surface Mining Regulation Litigation,* 456 F. Supp. 1301, 1319-21 (D.D.C. 1979). A solid body of case law, as well as sound social policy, allows the existence of the power to order such summary cessation in the case of imminent danger to the health or safety of the public. A careful distinction must be drawn between the two situations contemplated by the Act, however, because neither case law nor sound policy allows the exercise of such a power for imminent environmental harm.

As has been identified in Part III(A), above, the issuance of a cessation order constitutes a deprivation of a property right because it requires a cessation of mining activities. This is a deprivation which takes place without a hearing. Pre-hearing deprivations are, under current standards of procedural due process, the exception rather than the rule. *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972); *Mitchell* v. *W. T. Grant,* 416 U. S. 600 (1974); *North Georgia Finishing* v. *DiChem Inc.,* 419 U. S. 601 (1975). For a power such as that granted by Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), to be valid, it would have to fall within the extraordinary situations exception of *Fuentes.*

In the case of imminent danger to the environment, there is missing the essential element of *Fuentes* that the situation call for very prompt action. None of the cases normally cited as calling for a special need for very prompt action involve the concept of environmental harm. *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U. S. 663 (1974), involved the pre-hearing seizure of a ship carrying contraband, a situation in which the need to secure the contra-

band was obvious. *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950), upheld a pre-hearing seizure of mislabeled vitamins, a case in which the danger to the public of a failure to take prompt action is clear. While it is true that the cases do uphold the availability of prehearing deprivations to protect the public health or safety, there is no decision of the United States Supreme Court upholding such authority for situations of imminent danger to the environment.

Despite the fact that there is sound policy to uphold summary powers to protect the public, there is no such policy applicable to the environment. Indeed, sound policy would dictate that such decisions be postponed until an opportunity for a hearing has been afforded. Courts have upheld the granting of powers to summarily infringe upon property rights in cases of danger to health or safety because these are concepts with which reasonable people are familiar. The sheer number of cases would indicate that the legal system is familiar with assessing such dangers to persons. There is no similar body of case law with which to assess danger to the environment. Neither is the concept of danger to the environment something about which reasonable persons would agree in all cases. In a very real sense, all life and all activities are potentially harmful to some aspect of the environment. Absent any clear ability to define the concept of danger to the environment, sound policy dictates that any exception to the normal rule of pre-deprivation hearings not be extended to cover such cases. Since prehearing deprivations are the exception, it is best to limit such exceptions to those cases in which the necessary determinations may more readily be made. The difficulty outlined here in applying the nebulous con-

cept of danger to the environment is exacerbated by the fact that this is a concept which is not defined by the Act itself.

C. The Provision of Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), Allowing Issuance of Cessation Orders for Imminent Environmental Harm is Violative of Substantive Due Process Because it is Impermissibly Vague.

In the event that it is found that power exists to authorize summary cessation orders for imminent environmental harm without violating procedural process, it would still be the case that such power as is contained in the Act is violative of due process because that subsection of the Act is unconstitutionally vague. While the concept of due process as a control of vagueness is most often encountered in the area of criminal statutes, the basic principle has been said to apply to civil cases as well. "The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application in civil as well as criminal legislation." *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463 (1926). The Act does define in Section 701(8), 30 U.S.C. §1291(8) (1979), the meaning of "imminent danger to the health and safety of the public" as that term is used in Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), authorizing summary cessation orders. No similar definition is contained in the Act for "significant, imminent environmental harm to land, air or water resources" as that term is used in Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), authorizing summary cessation orders for imminent environmental harm.

An attempt has been made by O.S.M. to correct the statutory lack of a definition of the essential concept of

imminent environmental harm by utilizing the agency's power to formulate regulations. A definition of the term appears in the Federal Permanent Program Regulations at 30 C.F.R. §701.5 (1979). Certainly, without the gloss of any regulatory definition, the term as used in the Act would be impermissibly vague since the concept is so broad as to lack any guidance at all for federal enforcement personnel. The lack of a definition of the concept in the Act leaves its interpretation to the whims of the Secretary in the regulation process and renders that portion of the Act void for vagueness. Even with a definition of the term provided by regulation, such an attempt to place a gloss on the statute so as to render it constitutional is impermissible. The absence of sufficient notice on the face of the Act renders it unconstitutional on its face. *Wuchter* v. *Puzzutti,* 273 U. S. 13 (1928).

Even if it were correct that regulations could sufficiently clarify the Act so as to protect this subsection from being void for vagueness, no definition of environmental harm such as that contained in 30 C.F.R. §701.5 (1979) of the Permanent Program Regulations would be sufficient to salvage this portion of the Act. Within the definition of the concept as set out in the regulation there are terms so nebulous that they give the regulated parties no real notice of the conditions which will justify issuance of a cessation order. In addition to lacking clarity for the regulatees, the definition in the regulations is so broad that it provides no real guidance for federal inspectors as to when such cessation orders should be issued. This leaves field personnel of O.S.M. with virtually unlimited discretion in the process of deciding whether to issue a cessation order for imminent environmental danger. The usage of such terms as "any

adverse impact" and "appreciable and not immediately reparable" in 30 C.F.R. §701.5 (1979) of the regulations provide no solid guidance either to the industry or to inspectors. It is a basic premise of due process that citizens must be protected from the arbitrary and capricious acts of government. *Nebbia* v. *New York,* 291 U. S. 502 (1934).

As has been suggested in Part III(B), above, it is essential to draw a distinction between those summary cessation orders which may be issued for danger to the public and those which may be issued for danger to the environment. In cases of danger to persons or property, the matter is such that any reasonable person might recognize them; in addition there is ample case law to provide review of the correctness of such decisions. In the case of danger to the environment, the concept is in and of itself too vague to proceed without definitive guidelines. In this respect, the Act is deficient on its face. Even the regulations promulgated to remedy the defect are too vague to provide guidance. In the face of such deficiencies, it can only be concluded that Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), as it authorizes cessation orders for imminent danger to the environment is void for vagueness.

CONCLUSION

For the foregoing reasons, Amicus contends that the challenged provisions of the Act, are violative of the basic constitutional rights of persons such as Amicus. While the preservation of the environment from the adverse effects of mining is a legitimate legislative aim, no program may be implemented which is violative of the United States Constitution. Elimination of the challenged provisions from the Act will leave a regulatory framework that is capable of protecting the environment, but not at the unreasonable expense of the rights of the regulated parties. For these reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

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DATED: December 19, 1980

Nos. 80-231,
79-1538 and 79-1596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY
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Appellants,

vs.

STATE OF INDIANA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant (No. 79-1538),
Appellee (No. 79-1596),

vs.

VIRGINIA SURFACE MINING AND RECLAMATION
ASSOCIATION, INC., *et al.*,
Appellees (No. 79-1538),
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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF THE STATE OF ILLINOIS AS *AMICUS CURIAE* IN SUPPORT OF INDIANA AND VIRGINIA

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Printed by the Authority of the State of Illinois—1-81-200

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BRIEF OF THE STATE OF ILLINOIS AS *AMICUS CURIAE* IN SUPPORT OF INDIANA AND VIRGINIA

STATEMENT OF INTEREST

At stake in this case is Congress' undertaking of a fundamental governmental role, not ever exercised before in like manner by the United States, which properly belongs to states and localities: the governmental role of land use designation for privately owned lands. If this Court allows Congress to determine whether land may be mined and to designate land use for land which has been mined, premised on what the

Indiana Court below properly found to be a trivial percentage of the acreage of concern, the precedent will be established for Congress to designate land use for any land, anywhere in the nation. If Congress may designate land use and handling for reclaimed land from which coal is mined, Congress may presumably seek to make land use decisions for land from which corn, soybeans, cattle, timber, cotton, and any other product of the land are taken and sent into the stream of commerce. If coal, which is taken from 5,000 to 6,000 acres of Illinois' land annually, affects interstate commerce substantially to warrant Congressional decree of land uses and handling, then all the more substantial an effect will be made by grain, which comes from hundreds of thousands of acres of Illinois. It is also then not a great step to conclude that the use of land for any other purpose, be it housing, recreation or cemeteries, affects interstate commerce, and is thus governable by Congress. If the decisions below finding provisions of this Act to be violative of the Tenth Amendment are reversed, there is no clear or perceivable limit to the authority of Congress to designate and regulate the use of lands owned by private individuals.

Illinois produces vast amounts of grain and livestock, as well as a large amount of coal. Its citizens live in a diversity of environments, both rural and urban, and are free to choose to live in counties where zoning is not employed and cities where it is a strict and innovative device in the public interest. Illinois' government, and its local governments, have traditionally functioned as designators of land use. The Surface Mining Act, while displacing them from this role, thereby absorbs on behalf of the Federal government one of the powers which has traditionally made state and local governments viable, and useful, members of a federal system. The provisions of the Surface Coal Mining and Regulation Act stricken by the Courts below make government less responsible to the people it affects, and seriously impair the ability of state governments to protect and provide for the welfare and prosperity of their citizens. Illinois therefore files this *amicus curiae* brief in support of its sister states, Indiana and Virginia.

ARGUMENT

I. The Constitution Provides for a Federal Government of Limited Powers, With Important Reserved Rights to the States and People, Which Constitutional Balance Must Be Maintained by this Court

This case obviously presents fundamental questions concerning the scope, distribution and balance of governmental power under the Constitution. The State of Illinois files this *amicus curiae* brief, not as a rival or enemy of the Federal government, but as a partner in a public trust, held by government for the people. This trust and its exercise are verbally embodied in the Constitution. James Madison explained the meaning of this trust:

> *The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.* The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must be here reminded of their error. They must be told that the *ultimate authority* wherever the derivative may be found, *resides in the people* alone, and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of others. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constitutents. *The Federalist* No. 46 (J. Madison) Modern Library ed., p. 305. (emphasis added).

Given this premise, it is incumbent on the Supreme Court to confine the federal exercise of its trusteeship to that delegated by the people in the Constitution and to assure the reserved rights of the states and people to be free of federal regulation of their property and local affairs and to have the

benefit of state government in meaningful form. Rather than being simplistic, a resort to first principles is helpful in analyzing this case to a balanced and beneficial conclusion.[1]

This Court has historically recognized the need to provide judicial determination of the balance and distribution of power in our federal system. In this case, as in the past:

> The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty. *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 400 (1819).

One serious issue posed by this case is whether, logically, as a matter of constitutional law, the "part" (in this case "commerce among the states") under Art. I, Section 8, can swallow the "whole" of commerce, including local affairs. In other words, if use of private lands can be dictated by Congressional law, what then is left as a clear example of "local activity" that is not a part of "commerce among the states" and subject to Congressional regulation? The issue clearly is not whether the Commerce Clause can rationally be related to the subject matter of the Surface Mining Act. It would appear "rational" to define interstate commerce in such a way as to relate virtually

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[1] For an expanded discussion of historic principles of the intent and need for a strong federal judiciary empowered to arbitrate state and federal disputes, see P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System,* pp. 9-32 (2d ed. 1973).

any event in the United States, directly or indirectly, to interstate commerce; but such rationality is inconsistent with good sense and the intent of the Constitution.

It should be quite clear that the drafters of the Constitution had no idea the Commerce power could be as extensive as it has been held to be, so as to eliminate as a practical matter, the concept of activities that are beyond the scope of the Commerce Clause. Without denying that the complexity of modern society makes an expansive view of Commerce Clause authority an accepted necessity, that same complexity cannot substitute for reliance by the States and people on their Constitution to provide government limited to its enumerated powers and reasonably controlled and controllable by judicial review under the Constitution. *Cf. McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 405 (1819).

The power granted by Art. I, Section 8 of the Constitution "to regulate commerce . . . among the several states, and with the Indian tribes", was intended as one providing "for the harmony and proper intercourse among the States" in the context of assuring against indirect assessment of duties and assuring that the "reciprocal trade of confederated States" did not devolve into animosities among states. It was also seen as a necessary supplement to regulation of foreign commerce. *The Federalist* No. 42 (J. Madison) Modern Library ed., pp. 273-275. In contrast, the writers of the Federalist papers stated a belief that state governments would have extensive inherent powers:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. *The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and*

> *properties of the people, and the internal order, improvement, and prosperity of the State. The Federalist* No. 45 (J. Madison) Modern Library ed., p. 303. (Emphasis added.)

The commerce power, while "new" to the federal government, seemed to Mr. Madison "an addition which few oppose and from which no apprehensions are entertained." *Ibid.*, p. 303. And even more importantly, state governments possessed and had reserved broad authority to provide internal order, improvement and prosperity to their citizens. *Cf. New York* v. *Miln*, 36 U.S. 102 (1837).

Thus, the second issue of importance posed here involves the extent and meaning of the reserved rights of states to provide, in Madison's words, for their "internal order, improvement and prosperity". Virginia and Indiana have compellingly shown in the district courts how disruptive and damaging certain provisions of the Federal Act are to their economy and their ability to provide land use plans and other services for the betterment of their citizens. Local expectations and needs for housing are interfered with, jobs and the use of private land resources are threatened in ways which the local community cannot reasonably alter or affect. As will be more fully developed in Part III of this *amicus curiae* brief, Illinois' government and citizenry are similarly threatened by portions of the Act which effectively outlaw or make uneconomic the development of coal resources. Coal development provides the lifeblood of many Illinois communities, yet affects relatively small acreage in the State. Also, the ability of the Congress to "federalize" prime farmland threatens Illinois agriculture and farmers with a loss of control of the use of their property.

This Court should be aware, if it is not already, that numerous states have at one time or another strongly criticized the administration of the Federal Surface Mining Act. In a

resolution[2] unanimously adopted May 22, 1980, sixteen coal mining states of the Interstate Mining Compact resolved:

RESOLUTION

INTERSTATE MINING COMPACT COMMISSION

BE IT RESOLVED BY THE INTERSTATE MINING COMPACT COMMISSION (IMCC): that the federal domination and control over state and local land use and coal resource development, as contained in the "Surface Mining Control and Reclamation Act of 1977" (P.L. 95-87), and regulations thereunder, must be corrected by the Congress, and this authority must be restored to the states and local governments;

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[2] This resolution was adopted by authorized representatives of the Governors of the following states: Texas, Alabama, Illinois, Tennessee, Maryland, Ohio, Oklahoma, Pennsylvania, South Carolina, Virginia, West Virginia, Kentucky, North Carolina, Indiana, Arkansas and Louisiana.

As of year end only 11 states had approved permanent programs. Of these, 6 were Western states, and 2 had few or no coal mines. Thirteen additional important coal states had submitted proposals for a permanent program which have been partially or wholly disapproved. Illinois is in this category. These states were required by the Act to resubmit revised programs in 60 days or lose program eligibility until after federal programs are imposed. Permanent programs for only 5 of these 13 states were resubmitted to the Secretary within the 60 days; resubmittal by the other 8, on information and belief, has been enjoined by state courts. See Section 503(d), 30 U.S.C. § 1253(d). Six additional states (none with a significant coal mine industry) either have not submitted a state program or have requested a federal program. Federal programs are being implemented for those 6 states. Nineteen states neither have coal mines or plans to produce coal in the future. It is misleading to look at the number of states which have submitted programs as evidence of the reasonableness of the provisions of the Act since many states have done so under the threat of federal imposition of a program. In this regard, most of the states which have submitted a program have expressed the view at one time or another that the Act is a threat to their sovereignty.

AND BE IT FURTHER RESOLVED THAT:

the intrusion of federal power into this area of state responsibility is a threat to representative government and state sovereignty.

Issued this 22nd day of May, 1980.

The issues posed in this case do not call for judicial interference or second-guessing of the Congress on what its laws ought to be.[3] The statute in question is generally quite clear and specific, and it provides at specific points for federal authority over private lands of unprecedented scope and detail.

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[3] Some opinions of this Court contain expressions that in a representative government such as ours, the sole restraints on the Commerce power lie within Congress. For example, it has been said "the wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse." *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), (dissent quoting *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 197 (1824)). Illinois respectfully submits that where Tenth Amendment issues are involved, unless the Court is prepared to protect Tenth Amendment rights, their reservation in the Constitution is rendered a practical nullity by this line of reasoning, and the reserved powers of States might as well not be mentioned in the Constitution, since all legislative power, including traditional state police powers, would be effectively vested in the Congress, subject to exercise at its whim alone. Reference is made to the synopsis of the Court's rightful role in deciding these issues by Professor Mooney, page 8, note 2, Brief *Amicus Curiae* of Pike County, Kentucky, in the Virginia case (79-1538). The involvement of land use, a traditionally recognized area of state concern, in a Congressional statute should be an immediately suspect exercise of power, and should authorize federal courts to recognize the interest of a state in providing for its local welfare and prosperity. Whether as an absolutely reserved area immune from Congressional control, or an area of interest to be weighed in a balance with Congressional interest, the Courts have a necessary role in providing protection to the States and their citizenry from Congressional interference in land use, a key element of property rights and basis of state government tax and other internal policies.

The issues posed are fundamental issues of judicial review, as basic as the Constitution itself, calling into question whether Congress has, in Madison's words "misconstrue[d] [a] part of the Constitution and exercise[d] powers not warranted by its true meaning".

> In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; *The Federalist* No. 44, Modern Library ed., p. 295.[4]

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[4] Illinois believes that sensitive Executive implementation of the Act would greatly have relieved the practical difficulties most states face with the Act. The Act includes a finding that:

> because of the diversity of terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations subject to the Act should rest with the States. § 101(f); 30 U. S. C. § 1201(f).

Despite this finding, the Secretary of Interior chose to issue a comprehensive set of detailed regulations, 44 Fed. Reg. 15311-15463 (March 13, 1979), amplifying and making more detailed every requirement of the Act and requiring states to have regulations "no less stringent" than his regulations (30 CFR 730.5). If a state could demonstrate that it had a better alternative for any provision, based on local differences, it could submit them under the so-called "state window" provision (30 CFR 731.13(c)). The United States Court of Appeals for the District of Columbia has described the "state window" as a "one-way mirror." *In Re: Permanent Surface Mining Litigation* (Peabody Coal Co., Appellant), No. 80-1308, (D.C. Cir., July 10, 1980), Rehearing *En Banc* Ordered and Pending. The adopted regulations of the states which have already obtained federal program approval, and the lists of problem areas of state submittals for states which have not yet obtained approval, support this description. The State of Illinois is appealing the Order of the District Court upholding the idea that Congress intended a federally dictated set of regulations to govern state programs. *In Re: Permanent Surface Mining Regulation Litigation,* No. 79-1144 (D.D.C. May 16, 1980), appeal docketed, No. 80-1810 and consolidated case nos. 80-1811, 80-1812, 80-1813 and 80-1823 (D.C. Cir., August 20, 1980).

Although reversal of the District Court on the issue of primary responsibility for the regulation under the Act would alleviate matters, a limited number of direct land use requirements of the Act concerning restoration of approximate original contour, prohibitions and conditions on the use of particular land, including prime farmlands, for mining, and approval of post-mining land use remain and pose serious unconstitutional threats to Illinois, as well as to Indiana and other Midwestern coal states.

Where a clash between the federal Congress and the rights of the people and states to provide for their local affairs and prosperity are involved, the issue can be no less susceptible to judicial review than in cases where rights of private parties are injured by executive or legislative power, or states interfere with Federal law, e.g. *Marbury* v. *Madison,* 5 U.S. (1 Cr.) 137 (1803), *Youngstown Steel & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819), *Metcalf* v. *Mitchell,* 269 U.S. 514 (1926).

The District Courts below were both sensitive to the interests of state and federal government, and, after trial on the merits, concluded that in important respects, Title V of the Act oversteps the Commerce power and invades the reserved powers of the states. This Court should have no hesitancy in affirming the District Courts, which acted as intended by the Constitution to limit federal authority to the powers granted thereunder.

II. Title V of the Act Authorizes the Federal Government Directly or Indirectly to Exercise Police Power Control Over Local Affairs of Private Persons and the State, In Excess of Congress' Constitutional Authority under the Commerce Clause and Contrary to the Tenth Amendment

The Secretary asserts that the Act is properly preemptive of State law and that states' integral functions are not necessarily affected thereby.[5] Thus, one of the more useful ways to analyze the Virginia and Indiana cases is to consider the effect of Title V in a state that does not choose to submit a program, or fails to submit an approvable one. Under the standard constitutional theory relied on by the Secretary in his brief, Congress need not have given the States an opportunity to undertake the program and could, if it wishes, empower the Secretary to preempt the field of regulation of the subject matter. In this view of the case, Congress has created the OSM to exercise preemptive and primary jurisdiction over surface and underground coal mining, in a State that fails to submit an approvable program, and the OSM will be the regulatory authority in such a state.

If that occurs, then the following effects necessarily follow, as a legal matter:

1) The Federal government decides whether coal can be mined in a State and issues mining permits under § 510(a).

2) In cases where the mineral estate has been severed from the surface estate,[6] the surface-subsurface relationship is determined in accordance with State law (as shown to the satisfaction of the Federal government), provided that the regulatory authority would not "adjudicate" property rights disputes. § 510(b)(6).

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[5] Secretary's Brief in the Virginia case (Nos. 79-1538 and 79-1596), pp. 26, 31.

[6] Illinois believes this is the case in most instances in Illinois. Operators normally lease the surface estate for the period required to extract the coal, and either pay a set fee per acre or a fee based on the quantity of coal extracted.

3) The Federal government finds in writing, whether the operator whose coal is overlain with prime farmland has technological capability to restore the land to equivalent agricultural yield levels after mining and to comply with performance standards in § 515(b)(7). The government in any event determines what farmlands are "prime" and subject to this special protection.

4) The Federal government decides on the rules that govern exploration for coal. § 512(a).

5) The Federal government notifies the local government in the locality (not the State), and otherwise deals directly with them in processing permits. §§ 510(a), 513(a).

6) The Federal government enforces the requirement that land be restored to a condition capable of supporting its prior uses, or higher and better uses. § 515(b)(2).

7) The Federal government decides on exceptions to approximate original contour of private lands in accordance with "an ecologically sound *land use*". § 515(b)(3).

8) The Federal government insures that all explosives at the mine are used in accordance with federal and State law and that notices to persons within one half mile thereof are given. § 515(b)(15).

9) The Federal government insures "that all reclamation efforts proceed in an environmentally sound manner." § 515(b)(16).

10) The Federal government enforces a requirement that access roads do not damage public or private property. § 515(b)(17).

11) The Federal government approves postmining land use. §§ 515(b)(19), 515(b)(20), and 515(b)(21).

12) The Federal government enforces all performance standards of Section 515, respecting soil handling, waste piles, impoundments, etc. Mining companies may be

required to meet "such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site; and to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable". §§ 515(b)(23) and (24).

13) The Federal government decides on the manner of mountain top restoration land use based on whether an "equal or better economic or public use" will be achieved. § 515(c)(3).

14) The Federal government regulates all surface effects of underground mining. § 516.

15) The Federal government decides what lands in a state are to be designated unsuitable for mining, and may declare unsuitable for mining any lands inconsistent with farms, woodlands or other renewable resource use on the surface as found by the federal government to be prudent. § 522(a) and (c).

From the above review it should be apparent that the overall effect of OSM's exercise of authority is to supplant the states and private persons in the supervision of the use and development of privately owned land and to regulate the conduct of mining with respect to what are, overwhelmingly, local effects. Mining (as distinguished from the sale of mined coal) is essentially a use of real estate,[7] and, except as adverse effects on waters of the United States or the ambient air quality relatable to national air quality standards can be found, the

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[7] In many instances, mining is the only use of an interest in real estate, viz. where the mineral rights, are owned separately from the surface rights, which is a common occurrence. This property is governed by state law. *Cf.* Ill. Rev. Stats. (1979), Ch. 96½ Pars. 156, 4401.

activity is strictly local. Rather than set air emission or water discharge limitations relatable to environmental quality that affects commerce beyond the mine, the very conduct of land use and handling is directly regulated by the above cited provision in Title V, and the future use of land is provided for. Thus, the regulation of the subject matter is not of commerce, but of local activity, including not only mining but permission to use land for mining and regulation of postmining land use.

The precedent set by upholding the authority asserted by the Secretary of Interior in this case would logically lead to a conclusion that the Federal government can determine not only local land use, but also how local land use decisions are made. This will enable Congress to displace and override local land use decisions and authorize and supervise the conduct of industry, or local housing patterns, not because they threaten the public and environment in a manner that impedes on interstate commerce, but because they may have only a trivial "ripple" effect on interstate commerce. As found by the District Court in the Indiana case, only a trivial percentage of national agricultural product is affected by surface coal mining.

If the challenged provisions of the Act are upheld, no significant amount of coal can be mined without the federal government's permission, and in accordance with detailed standards set by the government in the Federal Act and the Secretary's rules. Thus, the question is posed by this case of the extent to which the Federal government can effectively take over the conduct of an entire basic industry,[8] and at the same time, supplant private owners and local and state governments to decide issues of land use.

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[8] The Secretary's briefs repeatedly refer to coal mining as if it were a "public nuisance" subject to very stringent controls or even abolition. See, e.g., Secretary's Brief in the Virginia case (Nos. 79-1538 and 79-1596), p. 55. Illinois does not dispute that surface coal mining is often accompanied by temporary significant local changes, or that, if improperly managed, it can pose undesirable threats of a long term type. However, as shown at trial, agriculture itself has

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The Secretary's brief passes off the question of Congress' asserted power as more or less routine. It cites cases upholding the right of Congress to regulate for "environmental" reasons.[9] Not unlike the concept of interstate commerce itself, "environmental" concerns are ubiquitous, and can be rationally extended and related to every human activity. This Court must not let the necessary goals of environmental protection, which are shared by every state and a majority of the populace, substitute for analysis of the central issue—whether under our system of laws the Commerce Clause of the Constitution extends to the declaration of areas of states unsuitable for given use, and to the determination that certain privately owned lands and minerals may or may not be used at all, or except on conditions imposed directly or indirectly by the federal government for the handling and postmining use of the real estate on which the mine is located.

Contrary to the Government's assertions, the authority of the Government to make land use decisions is not the same as that asserted in the nation's major environmental protection laws. The Clean Water Act, although revised a number of times since its initial passage, has consistently been administered

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adverse environmental effects on water quality. If coal mining is a "nuisance", and thereby subject to strict control by the federal government, then no basic industry or farm in this country is safe from total federal control. Neither *Mugler* v. *Kansas,* 123 U.S. 623 (1887), nor any other case upholds such power in Federal hands.

The Federal government's attempt to seize control over coal mining appears especially objectionable when one considers that the Federal government owns and the Secretary of the Interior controls vast amounts of coal in the Western states. In many instances this Western coal competes with coal produced in Illinois and other Midwestern states. By imposing unreasonably stringent prime farmland reclamation requirements on Midwestern coal producers, which requirements are not applicable to Western mines because they are not located on prime farmlands, an unscrupulous Federal government could discourage Midwestern coal mining and place its coal resources in a favorable competitive position. See also, note 19, *infra.*

[9] See Secretary's Brief in the Virginia cases (No. 79-1538 and 79-1596), p. 25, note 13.

> . . . to recognize, preserve and protect the primary responsibilities and rights of the State to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . . 33 U. S. C. § 1251(b); also
>
> It is the policy of Congress that the authority of each to allocate quantities of water within the jurisdiction shall not be superseded, abrogated or otherwise impaired . . . 33 U. S. C. § 1251(g).

With respect to the Clean Air Act, Congress found specifically that urbanization has resulted in mounting dangers to public health and welfare, but that:

> "the prevention and control of air pollution *at its source* is the primary responsibility of State and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added.)

The cases cited by the Government do not change the picture of states being the responsible agencies with respect to local land use and economic development decisions. The states are given meaningful responsibility to decide the precise mix of controls they will insist on to achieve the national ambient air quality standards.

Illinois does not question Congress' power to set valid air or water pollution discharge regulations for the mining industry. Thus, to the extent necessary to control such effects, Title V is presumably valid. However, a review of Title V shows that effects other than air and water pollution control are its main focus. If air or water discharge standards were all that is involved, the Title could be reduced to a few paragraphs of text. The Act contains soil handling techniques and revegetation requirements which concern themselves with local impacts. It also makes direct land use decisions. As such, these are inherently suspect exercises of Congressional commerce clause power at least where their exercise can be shown to usurp or directly affect state police power functions, or make the delivery of state services difficult.

The Congress, in asserting what is effectively a power to "zone" the United States, imposes on particular states and individuals, by action of representatives elected from other states,[10] a fundamental diminution of their right to use real property (or mineral rights) which they possess. Effectively, ownership and control of energy resources will have been shifted from private hands into the hands of United States government officials. Private ownership will not be a right to reasonable use of property, but a mere privilege to request government permission to make any use thereof. Illinois urges this Court to reject a future that so places the populace and its general welfare at the mercy of big government. The Secretary asserts that this Court is bound to uphold any law for which there is a "rational" basis of connection with regulation of interstate commerce. This argument, extended to its ultimate conclusion in this case, has drastic and dangerous results for the future of the people of this country.

> To press a juristic principle designed for the practical affairs of government to abstract extremes is neither sound logic nor good sense. And this Court is under no duty to make law less than sound logic and good sense. *New York* v. *United States,* 326 U.S. 572, 577 (1946).

The exercise by the Federal government of the powers granted in Title V deal predominantly with local affairs of land use. Even if land use authority is not viewed as "exclusive" with the States, the attenuated basis for assertion of commerce power in this controversy clearly exceeds Congress' authority, and improperly invades important state rights reserved by the Tenth Amendment.

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[10] Representatives of local government are generally the individuals who have zoning power, if such power is granted by state legislatures. If a state were to perform a statewide zoning function, local citizens at least have a realistic means of controlling the exercise of that power at the ballot box. On a national scale, certain states with resources Congress finds valuable effectively become subject to treatment as special zones or provinces of the Congress, with no countervailing compensation or practical means of controlling the process at the ballot box because the adverse economic or other effects are borne not by Congress, but by the locality. These effects include jobless pay, welfare, lower property, sales, income and severance taxes, etc.

III. The Provisions of the Act Found to Invade States' Rights in the Indiana Case Will Seriously Interfere With the Rights of the State of Illinois.[11]

The State of Illinois probably has more at stake in the outcome of this case than any other state of the Union. Illinois ranks third in the nation in number of acres of prime farmlands and contains an abundance of proven recoverable bituminous coal reserves. Illinois' policy, law and regulation is dedicated now, as it was prior to enactment of the Surface Mining Control and Reclamation Act of 1977 (the "Act"), to the maximization of the benefits of these resources and the minimization of harm to its citizenry from their use.[12]

If the judgment of the Federal District Court of the Southern District of Indiana should be overturned by this Court on the basis that the Constitution allows Federal government control over private land (including private mineral resources) and the post-mining land use of land in a state, then the right and sovereignty of the State of Illinois and its local citizenry and municipalities to determine land development and use within their borders will be mortally wounded. At least 9 million acres of Illinois prime farmland would be effectively subjected to the status of a federal province, and Illinois and its

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[12] Illinois has regulated coal mining since 1874, and the reclamation of surface coal mines since 1971. P.A. 77-1568, eff. Sept. 17, 1971. It has issued mining permits and required compliance with stringent farmland reclamation requirements since prior to passage of the Federal Act. Illinois Surface-Mined Land Conservation and Reclamation Act Rules and Regulations, Rule 1104. State regulation of coal mining is comprehensive. See Ill. Rev. Stats. (1979), Ch. 96½ §§ 251 *et seq.*, 4001, 4101, 4401, 4501, *et seq.*, 7901 *et seq.*

[11] The Indiana case is emphasized by Illinois because Indiana's facts and interests are closer to Illinois' than are the steep slope concerns dealt with in the Virginia decision. Illinois supports affirmance of portions of the Virginia decision appealed by the Secretary, and, remand of the portion appealed by Virginia for a determination of those sections which interfere with the State's rights this Court finds protected by the Tenth Amendment.

citizens would be deprived of their reserved rights under the Tenth Amendment to the Constitution of the United States. For these reasons, Illinois supports the State of Indiana and the Commonwealth of Virginia.

The positions urged herein are based upon the premise, expressed at length in the trial Court's decision in the Indiana case (Slip Op. pp. 22-25), that the prime farmland provisions of the Act, which were found below to exceed the Commerce Clause power and to invade the Tenth Amendment, will be imposed by the Department of the Interior within the state in any event. The provisions will be imposed directly, in the event a state does not seek or obtain program approval from the Secretary of the Interior, or indirectly, and subject to federal control, in the event a state program is authorized. Illinois supports a strong, independent state legislative effort to require land preservation and reclamation by coal mining operations, which effort might, in the judgment of state officials and the State General Assembly, include some or all of the same or similar provisions invalidated by the Court below as requirements improperly imposed by the Federal government upon states and their citizens.

Federal designation of land use of reclaimed prime farmland, and determination of lands which are unsuitable for coal mining, will impair the integrity of Illinois' state and local governments, and will diminish their ability to function effectively in a Federal system. The most fundamental loss to Illinois and its citizens that arises from the provisions held unconstitutional below is the ability for the State independently and freely to make its own laws on the subject of the use of its resources and land use within its borders. Under the Act, all Illinois' laws on the subject of coal mining and coal mined land reclamation become subject to the scrutiny of the Secretary of Interior. See Act, § 505, 30 U.S.C. § 1255. While the Commerce and Supremacy Clauses of course enable federal legislation to occupy the field of a subject of interstate commerce, this case represents the well-documented judgment of a

federal district court, after full trial, that certain of the requirements imposed by Congress on coal mine operators are directed at a subject having at best a trivial impact on interstate commerce: the handling, replacement and post-mining land use of certain farmlands defined as "prime" because of their favorable crop production capacity and historical use, and the designation of lands unsuitable for mining within a sovereign state.

The Surface Mining Control and Reclamation Act works a severe and disabling injury to the functioning of state and local government in Illinois because of the imposition of federal dictation of the special handling of prime farmlands, and a displacement of state decision making on the suitability of lands for mining.[13] Almost all Illinois coal mines (both surface and

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[13] At page 23 of his brief, the Secretary attempts to indirectly refute what he characterizes as the "suggestions of the [Indiana] district court's opinion" that the Act regulates the post-mining use of mined lands by arguing that while the Act encourages the farming of prime farmlands, it does not mandate such use. In note 13 the Secretary further states that 30 C.F.R. § 823.11(c), § 823.15(b) and (c) of his regulations, which require that mine operators actually grow crops on prime farmlands during the post-mining reclamation period, were remanded by the United States District Court for the District of Columbia. The Secretary's statement is misleading and not completely accurate. First, the Secretary is actively appealing the District Court's remand of 30 C.F.R. § 823.15(b) and (c). Brief for the Secretary of the Interior as Appellee and Cross-Appellant, dated December 23, 1980, *In Re: Permanent Surface Mining Regulation Litigation,* No. 80-1810 and consolidated case nos. 80-1811, 80-1812, 80-1813, and 80-1823 (D.C. Cir., filed July 15, 1980) at 52-61, and Letter containing non-binding statement of issues to be raised on appeal, from the Justice Department to Christine N. Kohl, Chief Staff Counsel, U.S. Court of Appeals for the District of Columbia Circuit (September 29, 1980). Further, although the District Court remanded 30 C.F.R. § 823.11(c) and § 823.15(b) and (c) in the first of

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underground)[14] contain overlying prime farmland so as to bring the disputed provisions of the Act into play at almost every significant mine site.

Illinois suffers economically, and state government's delivery of services is directly affected, by the Act's prime farmland requirements. Although Illinois is the nation's fourth largest coal producer, Illinois coal is not very much in demand relative to other states' coal. Despite Illinois' vast reserves and their

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its seriatim decisions, *In Re: Permanent Surface Mining Regulation Litigation,* No. 79-1144, ____F. Supp.____, 14 E.R.C. 1083, 1106 (D.D.C. February 26, 1980), it upheld 30 C.F.R. § 785.17(d) (1) of the Secretary's regulations which requires as a condition for issuance of a mining permit covering prime farmlands that "[t]he approved post-mining land use of these prime farmlands will be cropland"; Round II Mem. Op. at 5-6 (May 16, 1980). Illinois currently is appealing that portion of the District Court's ruling. Brief of the Appellant State of Illinois, at 44-57.

[14] It is very important for the Court to realize that underground coal mining is being subjected by the Department of Interior to similar rules as surface mining. See Permanent Regulatory Program. 30 CFR Parts 816, 817, and 823. Very serious technical and legal problems occur as a result of this approach, including the impossibility of assuring restoration of land disturbed for the construction of facilities which will stand for several decades. Judge Flannery, in the judicial review case challenging the Permanent Program regulations found the Secretary to have been too facile in his application of identical rules to underground mines. Virtually all recovery of coal in Illinois is affected by these disputed provisions. Illinois argued unsuccessfully in the District Court that underground mines were not intended to be covered as lands "to be mined" under the Act, Section 510(d)(1), 30 U.S.C. § 1260(d)(1). *In Re: Permanent Surface Mining Regulation Litigation,* No. 79-1144. (D.D.C. 1980), appeal docketed, No. 80-1810 *et al* (D.C. Cir. August 20, 1980).

attractive heat value per pound, the relatively high sulphur content of its coal coupled with stringent air quality and emissions requirements applicable to its combustion have flattened demand for Illinois coal. The Federal Act, in Title IV, not directly at issue, imposes a severance tax on Illinois coal. Illinois' "share" of the moneys is withheld unless Illinois changes its laws to conform to federal law on the subjects complained of below. This abandoned mined land fund, while of great merit, thus collects the very same marginal severance taxes which the Illinois coal market might afford if imposed directly by the state and holds them "for ransom." Likewise, at this time, roughly two thousand miners are out of work in the Illinois coal fields, while another 400-600 are working short work weeks. Many more jobs are indirectly affected. In the past year, five large Illinois coal mines have closed. At least two of these closures are relatable in part to the implementation of the prime farmlands provisions complained of below. The burden of this unemployment is borne directly by Illinois' government, state and local, in the provision of welfare services and the erosion of income tax base. By federal dictation of the terms on which, and whether, coal shall be mined, Illinois' citizens, both the employed and the unemployed, are deprived of a direct voice in their economic and environmental destiny.

Only some 5,000-6,000 acres of Illinois lands are newly mined annually. All of this acreage is subject to prompt, strict reclamation under state law. By contrast, in 1979, some 327,000 farmland acres (not all "prime") were in voluntary "set aside" programs. The Federal government paid the owners of those lands more than $7 million not to grow crops. Even if Illinois' annual mined acreage were to double overnight, it still would require some 32 years to mine the land in Illinois set aside deliberately last year to alleviate low prices in the farm commodities markets. In fact, lands mined in Illinois are restored to their optimal use, and rowcrop quality lands must be restored to rowcrop capability under Illinois law.

Appendix A is an excerpt of relevant provisions of Illinois law in effect since 1975, well before the passage of the federal Act. Ill.Rev.Stats. (1979), Ch. 96½, par. 4507.

The State also has an interest beyond that of protecting the role of making land use designations. Rights of citizens of the State will be infringed if the prime farmland use provisions are allowed to stand.[15] By requiring a mine operator actually to use the reclaimed land as farmland until yields reach those of surrounding lands, the Act deprives the owner, who farms for a living, of the use of his property during the *time the operator must farm* the land.[16] The Secretary of the Interior has ruled that the Act allows preparation of the land prior to cropping to continue for up to ten years (30 CFR 823.15(b)) and to require at least three successive years of yield which are equivalent to yields from surrounding farms (30 CFR 823.15(e)(i)). This interpretation indicates that an owner's land could be occupied by the coal mine operator as many as thirteen or more years after mining and neither the Secretary nor the Act puts an absolute maximum time limit for compliance with the Act's requirement to reach equivalent yields other than "a reasonable time." Illinois believes an owner should not be deprived of the use of his land for such long periods of time. His land's use should not be designated by a national legislature constituted of representatives from all fifty

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[15] In such a case, this Court has allowed one standing to assert the rights of third persons when enforcement of the challenged provisions against one would result indirectly in the violation of third parties' rights. *Warth* v. *Seldin,* 422 U.S. 490, 510 (1975).

[16] The State of Illinois has received inquiries from farmer-lessors about the length of time they must wait after mining before they may farm their land again. The Secretary's brief in the Indiana case (No. 80-231), p. 23, makes it appear that this issue of requiring crops to be grown is moot, because the District Court in the final judicial review of the regulations found this rule inconsistent with the Act. To the contrary, the Secretary persists in asserting this requirement by appealing this holding in a brief filed December 23, 1980. See note 13, *supra.*

states. Further, local governments should not be deprived of their traditional right to designate land use for the length of time which will be required to meet the Act's requirement.[17]

There are numerous examples of how the Act regulates or interferes with state governmental decisions. Illinois believes it should have freedom to decide in given cases that a mine is more important to a community than whether exactly 100 or more per cent of pre-mining crop yield is obtainable after restoration of the soil. See Section 510(d)(1). Illinois may not wish to approve post-mining land uses at the state level, as required by the Act, but instead to leave such decisions to local government and private owners. See Section 515(b)(2). Although Illinois may not object, a given state may not wish to structure its government such that a local governmental agency must have certain rights. See, e.g., Sections 508(a)(3)(8); 510(a); 513(a); 515(b)(2); 515(b)(15)(A). Neither should a process for land use planning be required of a State at the risk of federal intervention. See Section 522(a).

Reduced production of coal results from a number of factors, of course. However, it is undeniable that such reduced production can be expected because of unreasonably high costs imposed on Midwestern states, compared to Western mining that is not governed by the prime farmland rules struck down by the Indiana district court. For seven important Illinois mining counties, a Southern Illinois University study on the impact of Western coal in Illinois shows projected losses of as many as 2,592 direct mining jobs and 6,749 indirect job losses, for a total seven county loss of as much as $132,369,788 in total

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[17] The constitutionality of the Secretary's rule requiring that where prime farmlands are proposed for mining "the post-mining land use of these prime farmlands will be cropland", 30 CFR § 785.17(d)(1), and related provisions interfering with state and local decisions on land use were challenged by Illinois in the judicial review case, but have been decided adversely to Illinois and are on appeal. See note 13, *supra*.

income by 1985.[18] Not only are local property tax revenues jeopardized, but serious burdens are imposed on the State in terms of lost income and sales taxes, increased demand for social welfare services, and reduced ability of the State to aid local government with rebates from sales and income taxes. States cannot be put at Congress' mercy because of Congressionally determined land use policies, without serious adverse effect on their ability to effectively govern and provide services to their citizens.

What especially concerns Illinois is Congress' apparent decision that prime farmland, once affected, must be returned to an actual use of crop production, regardless of the legitimate needs of its growing population as traditionally determined by locally chosen officials. One irony of the requirement of returning prime lands to cropland is that it removes from alternate use the very lands whose agricultural productive capacity is most in dispute. The faces of communities can change drastically over a ten to fifteen year period, and state and local governments should be allowed to provide for such changes so there will be no possibility of an operator's having to farm reclaimed land while a growing community expands around him and urbanization thereby occurs on unmined prime farmland in the surrounding area. In Illinois, almost 100,000 acres of prime farmland are taken out of crop production annually, including only 5,000 or 6,000 acres taken temporarily for the use of coal mining. In many communities in Illinois, there is no practicable choice of another type of land to be affected by expansion of communities and public roads and facilities.[19]

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[18] The figures quoted assume continued heavy emphasis on Western coal, due in part to environmental restraints not at issue here. The Coal Extraction and Utilization Research Center, SIU—Carbondale, *Final Report: The Economic Impact of Western Coal in Illinois,* June 22, 1979, Table 11-17.

[19] The danger to Illinois from federal control of prime farmland use is not limited to its mining counties. Illinois contains an estimated

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Illinois is thus before this Court in less than the happy position of undoubtedly appearing to some of its citizens most concerned with the preservation of farmland and the values of community life associated with farming, to oppose good reclamation law. To the contrary, in fact, Illinois' government finds workable and reasonable as a police power measure, appropriate for a state to enforce, the substance of § 515(b)(7), 30 U. S. C. § 1265(b)(7), which includes the provisions for soil handling and reclamation of prime farmland properly found by the Court below to be outside of Congress' power to impose

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23.8 million acres of prime farmland and other farmland which is used to produce rowcrops. Approximately the southern two-thirds of Illinois is underlain by bituminous coal reserves; Illinois contains approximately twenty-five per cent of the nation's bituminous coal reserves. The total of estimated coal reserves in Illinois is 162 billion tons of which 30 billion tons, or roughly 1/8 of the nation's total recoverable coal reserves of all types, is recoverable under present technology. Of this 30 billion tons, about 30-40% is mineable by surface mining methods and the rest are mineable by underground mining methods. Prime farmlands cover at least 50 to 60% of the coal reserves in the state, and are interspersed so as to cover for practical regulatory purposes a much greater percentage of mined land.

Because of the large size of Illinois' coal reserves and other reserves underlying Indiana and Western Kentucky, one practical effect of allowing the Interior Department to prescribe land use controls that help keep this coal from the marketplace is to tend to give to the Interior Department monopoly power over coal resources. Much of the coal mined in the West is coal from federal lands or lands located such that federal lease rights control its being mined. Thus, without paying for the nation's largest energy supply, the federal government, by land use control, can effectively see to the maximization of federal profit from coal development. Thus, contrary to intimations in the Secretary's brief that the governmental action here is not "entrepeneurial" in character (Virginia Brief, pp. 53, 54), the Interior Department daily exercises an entrepeneurial judgment on behalf of the government respecting the development of vast coal and oil resources owned by the United States, and inquiry into its economic impact is imperative. *Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104 (1978). For Interior Department entrepeneurial authority, See § 30 U. S. C. *passim.*

upon states and their citizenry. Illinois' own law served in part as a model for these provisions. Other provisions such as § 510(d)(1), 30 U. S. C. § 1260(d)(1), or § 519(c)(2), 30 U. S. C. § 1269(c)(2), contain desirable elements that are acceptable state police power measures if reasonably interpreted.

Illinois as a matter of state policy is committed to a long-term effort to secure and protect its natural bounty of prime farmlands against irreversible loss or degradation. Attached as Appendix B, is an Executive Order of Illinois' Governor, dated July 22, 1980, which confirms the policy of the State "to protect, through the administration of its current programs and regulations, the state's prime agricultural land from irreversible conversion to uses which result in its loss as an environmental or essential food production resource." In an official statement at a federal public hearing on the Illinois "permanent program" submittal, the Illinois Department of Mines and Minerals declared, in effect, that if court action (such as this) or other events result in a federal scheme of regulation less than adequate to protect Illinois' agricultural resources, it is prepared to work to assure such protection. Finally in Appendix C, there is reprinted a recent statement of Illinois' intent to protect prime farmland and other lands well suited to producing crops, as embodied in Rule 1104 (a Rule promulgated prior to the enactment of the Federal Act) which appears in the August 20, 1980 *Congressional Record* at pages S11279; we respectfully ask the Court to take judicial notice of these statements. Careful examination shows that in Illinois' mining counties, one million more acres of rowcrop lands are required, if mined, to be restored to their row-cropping capability than the Federal Act requires respecting prime farmlands. Thus Illinois assures greater total post-mining agricultural productive capacity than

that required by the Act, and this occurs by methods developed by experts costing significantly less per ton of coal than the preferred "federal" method.

Before the Act became law, Illinois was already strictly regulating surface mining within its borders. Among the most progressive of its regulations was Rule 1104, adopted in 1976, which prescribes topsoil removal, plus detailed requirements for a minimum 48 inches of root medium depth and texture of reclaimed land which was capable of growing rowcrops prior to its being mined. These requirements were developed by soils scientists with the particular goal of assuring adequate water holding capacity in the reclaimed soil to support rowcrops. They will continue to assure high quality immediate reclamation of coal mined lands.

Even if, for the sake of argument, Illinois or other states do not always provide the same rules and regulations for mining as are deemed fit by Congress, the Tenth Amendment must provide states with immunity from Congressional interference with land use decisions that so intimately involve local economies and affairs.

Whether federal bureaucracy enforces Congress' decree, or whether a State agrees to follow Congress' decree, at the risk of federal imposition of a program, does not alter the fact that Congress has removed from state and local legislative bodies their traditional authority to determine the most appropriate use of certain important lands within their jurisdiction according to their citizens' particular needs, as determined after those local citizens petition their local or state elected officials. Illinois would distinguish this statutory scheme from situations where eligibility to use a "carrot" of federal funds is contingent on adoption of a specific program. E.g., *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923). While abuses also exist of the "carrot" approach, it is sufficient to note here that the complained of land control provisions are federally enforced in a state even if the state decides to pass up the "carrot". The provisions for

mandatory direct or indirect federal control of land use must be held to be constitutionally faulty, or else the structure of the federal system will have been shattered. Such a holding will preserve a balanced federal system, and nothing therein would prevent Congress from passing a law using economic or other incentives to induce states, voluntarily, to adopt the measures unconstitutional as here imposed.

CONCLUSION

It is imperative to the harmony of and future sensible government of the federal Union that this Court limit the reach of the Act complained of to subjects reasonably within the intent of the Commerce Clause, and affirm the District Court decisions below insofar as they find provisions of the Act to have violated the Tenth Amendment rights reserved to the States. As beneficial as many specific provisions of the Act may be in an abstract sense, the effect of vesting land use control authority in Congress to the extent provided in the Act is antithetical to the proper functioning of state and local government, and to the liberty of the people.

Respectfully submitted,

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January 9, 1981

APPENDIX

APPENDIX A

Illinois Law Requiring Restoration of Productive Capacity, Effective July 1, 1975

Ill. Rev. Stat., 1979, Ch. 96½, par. 4507. Duties of Operator

§ 6. Duties of Operator. Every operator to whom a permit is issued pursuant to the provisions of this Act may engage in surface mining upon the lands described in the permit upon the performance of and subject to the following requirements with respect to such lands:

* * *

(j) When the Director determines that the land to be affected is (1) capable of being reclaimed for row-crop agricultural purposes and suitable for row-crop agricultural purposes based on United States Soil Conservation Service soil survey classifications of the affected land prior to mining, and (2) when the Director determines that the optimum future use of the land affected is for row-crop agricultural purposes, the affected land shall be graded to the approximate original grade of the land provided that the final cut and submerged roadways may remain if the Department determines that such final cut or roadways could form a water impoundment capable of supporting desirable uses such as water for livestock or wildlife; and if to be used for fish life, shall have minimum depths in accordance with standards for fish stocking as recommended by the Department, and provided further that the box cut spoil shall be graded in accordance with subparagraph (a) of Section 6:

The reclamation requirements in this Section do not apply to affected land used for a sanitary land fill if such sanitary landfill is approved by the Environmental Protection Agency. The Environmental Protection Agency may regulate the amount of land to be used for the purpose and may establish a time schedule for the orderly and timely completion

of such sanitary landfill. Any affected land designated for sanitary landfill and not used for such purpose within 5 years is subject to the reclamation provisions of this Section;

On all affected lands to be graded to the approximate original grade under this subsection (j) all or part of the darkened surface soil, as defined in this Act, shall be segregated during the stripping process and replaced as a final cover as a last step in the required grading. When available in such depth, at least 18 inches of the darkened surface soil shall be segregated and replaced. When less than 18 inches of darkened surface soil exists all such lesser amounts shall be segregated and replaced. In no case under this subsection (j) shall less than the top 8 inches of surface soil, darkened or not, be segregated and replaced. This segregation and replacement requirement may be altered by the Department only if it is determined upon the advice of competent soil scientists that other material available in the cast overburden would be suitable in meeting the reclamation requirements. Below the darkened surface soil the replaced material shall be suitable as an agricultural root medium. The Department shall determine by rules and regulations what constitutes a suitable agricultural root medium of composition and depth. On all lands to be reclaimed under this subsection (j), the operator shall not be required to create a soil condition better than that which existed prior to surface mining;

APPENDIX B

STATE OF ILLINOIS

EXECUTIVE ORDER Number 4 (1980)

PRESERVATION OF ILLINOIS FARMLAND

The natural resources of Illinois—land, minerals, water, and air—are both finite and fragile. In the absence of wise use and consistent management practices, these resources are threatened by irreversible damage or loss. Protection of the State's natural resources is essential to guard the public health, safety, and welfare, and to assure an adequate natural resource supply and quality for use and enjoyment by future generations.

Since World War II, the amount of Illinois land dedicated to agriculture has steadily declined at an average rate of approximately 100,000 acres per year. This substantial loss of farmlands is the equivalent of eight average-sized Illinois counties. If this trend continues, the State will lose the equivalent of another five or six counties by the end of the century.

The conversion and loss of agricultural land has diminished Illinois' cropland base and affects environmental quality. The supply of land most suitable for farming is finite. Conversion of this land to urban development and other non-farm uses reduces future food production capability and may ultimately undermine agriculture as a major economic activity in Illinois. With less prime farmland available, there will tend to be greater reliance on marginally productive land, resulting in greater soil erosion, increased fertilizer requirements and increased environmental damage. Loss of agricultural land can also reduce the beneficial role which the land itself can play. Agricultural land reduces runoff by absorbing precipitation, aids in replenishing groundwater supplies and can buffer environmentally sensitive areas from encroaching development.

The importance of preserving our agricultural land base has been recognized by the Illinois Rural Planning Council, the Task Force on the Future of Illinois, and in the State's "Comprehensive Growth and Resource Conservation Policies". Each of these efforts recommends that the State minimize the conversion of prime farmland that results from the direct or indirect effects of State programs and also encourages the achievement of related goals, such as reducing the loss of soil through erosion.

Agencies of the Executive Branch perform numerous functions which affect the management of Illinois' natural resources, including the conversion of prime agricultural land. Decisions on State grants and capital improvements may have significant impact on the conversion process, yet often they may not adequately recognize that agricultural land is a finite resource that can be irretrievably diminished as a result of State actions.

Currently there is no single policy or coordinating mechanism to ensure that State actions do not unnecessarily encourage the conversion of prime farmland to non-farm uses, particularly when there may be alternatives available that are less destructive to our best agricultural lands.

Accordingly, I order the following:

I. It shall be the policy of the State of Illinois to protect, through the administration of its current programs and regulations, the State's prime agricultural land from irreversible conversion to uses which result in its loss as an environmental or essential food production resource.

II. The Department of Agriculture shall be the lead agency for implementing this policy in the State of Illinois.

A. The agencies named below shall each prepare and submit to the Governor, with a copy to the Illinois Department of Agriculture, an Agricultural Land Preservation Policy no later than one year from the effective date of this Executive Order. This policy shall include an analysis of the impact on agricultural

land conversions caused by their programs, regulations, procedures and operations. The policy shall also detail measures that can be implemented by the agency which will mitigate conversions to the maximum extent practicable. Each policy shall provide for a greater degree of protection for Classes I, II, and III lands than for Classes IV through VIII (as defined by the U.S. Department of Agriculture). The agencies are: Capital Development Board, Department of Conservation, Department of Commerce and Community Affairs, Environmental Protection Agency, Institute of Natural Resources, Department of Mines and Minerals, the Department of Transportation, Bureau of the Budget, and the Illinois Commerce Commission.

B. Those named State agencies shall participate in an inter-agency committee chaired by the Illinois Department of Agriculture to solve mutual problems in meeting the objectives of agricultural land preservation.

C. The Department of Agriculture will analyze State funded capital projects that impact farmland conversion and advise the Governor's Office as to the consistency of agency actions with the policy established by this Executive Order.

D. After the second anniversary of this Executive Order, all conversions of agricultural lands by any State agency shall meet the criteria specified in that agency's Agricultural Lands Preservation Policy.

III. EFFECTIVE DATE

This Executive Order shall become effective on July 22, 1980.

James R. Thompson
Governor

APPENDIX C

* * *

SENATOR PERCY:

I would like to submit for the RECORD a copy of a letter I received this morning from Mr. Douglas Downing, supervisor of the land reclamation division of Illinois' Bureau of Mines and Minerals, in which he affirms Illinois' total commitment to prime farmland reclamation and a 1982 grandfathering sunset.

* * *

STATEMENT TO SENATOR CHARLES PERCY FROM THE ILLINOIS DEPARTMENT OF MINES AND MINERALS ON PRIME FARMLAND AND CROPLAND RECLAMATION

The State of Illinois has consistently and historically advocated quality reclamation. We have every intention of promulgating and enforcing a law and regulations which carry out the requirements of P.L. 95-87. Two specific examples will prove that Illinois had the goal of good reclamation before the federal law was passed, and that we continue to impose requirements in excess of the federal law to insure retention of agricultural capability on the maximum number of acres.

First, in 1976, Illinois enacted Rule 1104, developed by soils scientists of international reputation from the University of Illinois and other Illinois schools. Rule 1104 has been adopted by the Illinois legislature for the permanent program, even though the federal law doesn't require it. During the permanent program, under Rule 1104 standards, operators will be required to return to rowcrop capability, land which does not meet the definition of prime farmland, but which is nevertheless

capable of producing rowcrops. By contrast, the federal regulations merely require that such land be revegetated. Since there are approximately 1,023,181 acres of land in Illinois mining counties which would be subject to Rule 1104 standards but not to prime farmland requirements, this means that Illinois would require a return to rowcrop capability for over one million acres more than would federal law alone.

Second, the State of Illinois was the originator of the idea to limit prime farmland grandfathering to 1982. Such a limitation has been placed on every single exemption granted by Illinois despite the fact that no time limitation is contained in the Federal Act or has ever been contained in adopted federal regulations. However, OSM has adopted this idea and is now proposing it as part of its proposed exemption regulations.

To date, Illinois has issued permits for approximately 2,700 acres upon which a prime farmland restoration plan has been submitted and approved. The federal prime farmland standards will apply. More acreage will be subject to these standards as time goes on, since Illinois has always interpreted the grandfather clause as a transition exemption only, as is obvious from the 1982 limitation. Of the acreage grandfathered by Illinois under the federal Act and regulations, only about 12,000 acres of it will actually be mined. Rule 1104 standards apply to grandfathered land. It's time that the facts be made known concerning the reclamation which will be required of grandfathered land in Illinois. The exempted land will have a minimum of eight inches of topsoil saved and replaced. Under the federal prime farmland rules, only a minimum of six inches would have to be saved and replaced. The entire rooting media of exempted land will be 4′ deep. Under the federal prime farmland rules, the rooting media would be 4′ also, unless there was a root inhibiting zone, or fragipan, within the premining surface 4′, in which case the prime farmland rules only require rooting media to the depth of the premining fragipan. Finally, the exempted land will have a

rooting media of a mixture of the B-C horizon. Under the prime farmland rules, a mixture of the B-C horizon is specifically allowed. The exempted land will be released from bond only when capability to achieve 90 percent of premining yield is shown.

Illinois is adopting the prime farmland standards and will enforce them, because there is a negligible difference between those standards and Rule 1104 standards, except for the many acres of fragipan soils in Southern Illinois. However, we will continue to apply Rule 1104 standards to restore the rowcrop capable land that is left out of the federal prime farmland requirements.

DOUGLAS DOWNING
Supervisor, Illinois Department of Mines and Minerals

* * *

FACT SHEET: GRANDFATHERING IN ILLINOIS

(Approximate acreage)

Total Acres Grandfathered[1] To Date (8/80) 29,903.
Prime Farmland Grandfathered, 16,059.
Prime Farmland Grandfathered which is planned to be mined, 12,143.
Federal Prime Farmland Restoration Plan—Approvals to Date (approximate acreage), 2,700.
Grandfathered land—1104 Reclamation Standards, Minimum of 8″ topsoil salvaged Root Zone 4′ deep.

[1] For convenience, exemptions are requested and granted or denied for entire permit areas, without specifically delineating prime farmland soils within the permit areas. In other words, this figure represents both prime farmland and non-prime farmland.

Federal Prime Farmland Reclamation Standards, Minimum of 6″ topsoil salvaged. Root zone 4′ deep, or less if root inhibiting zone, in which case root zone restored only to depth where premining root inhibiting zone existed.

Root zone of B/C mixture. Texture requirements for root zone: Maximum of 40% clay content.

Root zone B over C or B/C mixture. None.

Prime Farmland and Rule 1104 Land, Illinois Mining Counties (Approximate Acreage):

Prime Farmland, 2,049,800.

Row Crop in Excess of Prime Farmland, 1,025,181.

Prime Farmland Plus Row Crop, 3,074,981.

* * *

Nos. 79-1538, 80-231 & 79-1596

In the
Supreme Court of the United States

OCTOBER TERM 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, THE COMMONWEALTH OF VIRGINIA, AND THE TOWN OF WISE, VIRGINIA,
Appellees.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

STATE OF INDIANA, INDIANA COAL ASSOCIATION, MEADOWLARK FARMS, INC., AMAX COAL COMPANY, PEABODY COAL COMPANY, AND JOHN A. CONLON,
Appellees.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, THE COMMONWEALTH OF VIRGINIA, AND THE TOWN OF WISE, VIRGINIA,
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CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellee.

AMICUS CURIAE BRIEF IN SUPPORT OF THE VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, et al., AND THE STATE OF INDIANA, et al.

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Executive Office of the President, Special Analysis of the Budget, Fiscal Year 1979, at 1984 (1978) 4
Madison, *The Federalist*, No. 51 7
National Conference of State Legislators, State Legislative Oversight of Federal Funds: Preliminary Report and Suggested Activities 9 (1979) 4
Office of Management and Budget, Budget of the United States Government, Fiscal Year, 1979, (1978) 4
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AMICUS CURIAE BRIEF IN SUPPORT OF THE VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, et al., AND THE STATE OF INDIANA, et al.

Amicus curiae Mountain States legal Foundation respectfully submits the following views regarding *Andrus v. Virginia Surface Mining and Reclamation Association,* No. 79-1538; *Andrus v. State of Indiana,* No. 80-231; and *Virginia Surface Mining and Reclamation Association v. Andrus,* No. 79-1596. These cases were not consolidated for Supreme Court consideration, but are being considered in

tandem. The issues are sufficiently similar to permit the *amicus* to present arguments regarding these cases simultaneously.

INTEREST OF THE AMICUS

Mountain States Legal Foundation is a non-profit public interest law center, dedicated to bringing before the courts those issues vital to the individual rights and freedoms protected by the United States Constitution and the nation's legal traditions. The Foundation, which is supported entirely by the donations of its members, is deeply concerned with preservation of political accountability and citizen input into governmental decisionmaking. As *amicus curiae,* the Foundation presents to this Court various public policy reasons supporting a balance of powers between national and state governments.

Mountain States Legal Foundation has received written consent from all parties to file this brief as *amicus curiae*. Copies of these letters have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

In various provisions of the Surface Mining Act, Congress has usurped state government functions and exceeded the commerce power. This overreaching by the national government is only one instance of a continuing trend toward centralized decisionmaking that threatens to destroy the federal structure of government in America.

In deciding the *Surface Mining* cases, the Court should be informed of the potentially far-reaching implications of defining the boundaries of congressional regulation. To illuminate these matters for the Court, the *amicus* has examined the policy reasons for reserving meaningful functions for the states. Political accountability and public input are facilitated by clear divisions of authority, yet "cooperative federalism" destructively confuses the lines of respon-

sibility. Flexibility, experimentation and consideration of local factors are more readily accomplished through state and local level decisionmaking. The dangers of power concentrated in the hands of a few are best controlled by retaining a true division of power between the national and state levels.

These policy factors underlie the Constitutional Convention's choice of a federal system, and analysis of the Surface Mining Act shows that it fails to comply with the standards of federalism embodied in the Constitution. In particular, the regulation of land use falls outside the commerce power and, alternatively, is a traditional function reserved to the states under the tenth amendment.

The Act also unconstitutionally deprives mine operators of their due process rights by requiring prepayment of penalties prior to final determination of the validity and amount of the penalty. This prepayment effectively deprives operators of essential funds, thus potentially threatening the economic viability of mining concerns.

ARGUMENT

I. FOR CONSTITUTIONAL AND POLICY REASONS, INDEPENDENT STATE DECISIONMAKING MUST BE PRESERVED.

This Court's decisions in the *Surface Mining* cases will greatly influence the future of American government. These rulings will foretell either a gradual abandonment of federalism or a return to the separation of powers anticipated by the Constitution.

The nature of national/state relations has changed rapidly in the last few decades. The device known as "cooperative federalism" increasingly appears to be a scheme of national decisionmaking that endangers the federal structure of American government. The states are rapidly becoming departments of the national government whose

elected legislatures and executives must take orders from Congress and federal administrators. Today, fully *one-quarter* to *one-third* of an average state's budget is made up of federal funds. National Conference of State Legislators, State Legislative Oversight of Federal Funds: Preliminary Report and Suggested Activities 9 (1979). In 1950, federal grants of $2 billion comprised only 10.4 percent of total state and local expenditures. Fiscal year 1979 estimated federal outlays to states had risen to an astounding $85 billion. Executive Office of the President, Special Analysis of the Budget, Fiscal Year 1979, at 1984 (1978).*

If the federal form of government is to remain viable, the judiciary must delineate the boundaries of national and state powers. The Founding Fathers, and the courts until the New Deal, recognized the importance of state sovereignty. *See, e.g., Coyle v. Smith,* 221 U.S. 559 (1911); *United States v. Butler,* 297 U.S. 1 (1936). However, a drastic shift in judicial philosophy devastated the role of states in the federal system. *See, e.g., Steward Machine Co. v. Davis,* 301 U.S. 548 (1937); *United States v. Darby,* 312 U.S. 100 (1941).

National League of Cities v. Usery, 426 U.S. 833 (1976), was a first step in establishing guidelines for preserving state autonomy. Although *National League of Cities* marked a reawakening of state sovereignty principles, it did not provide a clear test for determining when the national government has overstepped the bounds of its

---

*Federal grants to states have grown at a consistently higher rate than overall federal expenditures. From 1967 to 1977, the average annual increase in grants was 16.2 percent while total federal outlays grew by 9.8 percent each year. Office of Management and Budget, Budget of the United States Government, Fiscal Year 1979, at 175 (1978). This growing dependence on federal funding has resulted in serious distortions of state spending priorities and management structures. Posner & Sorett, *A Crisis in the Fiscal Commons: The Impact of Federal Expenditures on State and Local Governments,* 10 Public Contract L.J. 341 (1978).

enumerated powers. Such a clear test is absolutely necessary to insure a continuation of autonomous state decision-making.

Instead of detailing the past history of state sovereignty and why the Constitution demands independent state decisionmaking — arguments that are adequately addressed in the other briefs submitted in this litigation — the *amicus* will emphasize the reasons that the national/state balance of power is desirable and functional in modern America. The *amicus* will present the legal, political, and philosophical reasons for strengthening state autonomy.

A. *National decisions disguised as state decisions obscure the lines of political accountability.*

The reality of "cooperative federalism" is that it creates numerous programs that are neither fully state programs nor fully national programs. Certain aspects of a program might be primarily state functions while some are primarily national, but the bulk of cooperative programs are a confusing mix of authority. The challenged provisions of the Surface Mining Act, for example, compel state legislation to be enacted "in accordance with the requirements of this Act." Section 503(a)(1), 30 U.S.C. § 125(a) (Supp. I 1977). Refusal to follow the demands of the Act or the Secretary's regulations results in usurpation of the state's role by a federal program. Section 504(a), 30 U.S.C. § 125(a)(Supp. I 1977).

This regulatory structure entirely distorts the usual lines of political accountability. For example, once a program is enacted, dissatisfied citizens have no clear recourse. State governments cannot alter programs because they are subject to continuing national commands, and federal agencies cannot unilaterally alter the state programs. Change is consequently more difficult because neither governmental entity alone is able to amend or abolish an unsatisfactory program. Thus, a representative form of government, re-

liant upon citizen input, erodes into an unresponsive and confusing labyrinth that is far removed from the fundamental principles of our constitutional system. *See Stromberg v. California,* 283 U.S. 359, 369 (1951); *United Mine Workers District 12 v. Illinois State Bar Association,* 389 U.S. 217 (1967).

B. *State-level decisionmaking allows more citizen input and more consideration of local factors.*

States long functioned as the governmental units most directly affecting the lives of individuals. As American life has become more complex and as population has increased, individual control over, and input into, the governing process has naturally decreased. However, this inevitable lessening of an individual's potential impact has been unduly accentuated by the increasing amount of regulation and by the centralization of decisionmaking. It is not surprising that public participation in the electoral process has gradually declined as individual efforts to influence the government have become more futile.

Furthermore, the removal of decisionmaking from the hands of state-level legislators and administrators to those on the national level must necessarily decrease the attention to local circumstances and local problems. An administrator who must plan for the entire country cannot easily tailor a plan to community needs.

The issues addressed by the Surface Mining Act require a careful balancing of social, economic and environmental factors. Such a balancing process can be most accurately undertaken by those familiar with local problems.

C. *State/national separation of powers is a valuable safeguard against dangerous accumulations of power.*

The Constitution is an instrument carefully designed to protect individual freedom by pitting the branches of government against each other. *See Buckley v. Valeo,* 424

U. S. 1, 120-23 (1976). The separation of powers between the national and state governments is as essential to the American structure of government as the separation between the three branches of the national government. The purpose behind both types of separation was the same: to protect against the tyranny that could arise from the accumulation of all powers in the same hands. The twofold protection envisioned by the authors of the Constitution was explained by Madison in The Federalist No. 51:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion alloted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The reluctance with which power was given to the national government is shown by this Court's observation in *South Carolina v. United States,* 199 U.S. 437, 456 (1905):

> The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the states, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government.

The fact that Americans have become accustomed to a massive, centralized government does not diminish the wisdom of the early patriots' concern. During this Court's current opportunity to reevaluate federal principles, the words of Justice Frankfurter, concurring in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 594 (1952), may prove to be a valuable reminder:

> The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions

that fence in even the most disinterested assertion of authority.

D. *States serve an important role as laboratories for social and environmental experimentation.*

A crucial reason for preserving independent state decisionmaking is to encourage the states to explore new approaches to governmental problems. As noted by Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion):

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

See also Connecticut Light and Power Co. v. FPC, 324 U.S. 515, 530 (1945). Independent innovation is particularly necessary in the case of new government regulatory activities, such as environmental regulation, because state experimentation can hasten the development of successful regulatory techniques. Furthermore, since long-term impacts of environmental regulation may not be readily apparent, experimentation on a local level may avert major adverse effects. The Surface Mining Act and the accompanying regulations contain numerous requirements that are highly technical and very detailed. Little latitude is provided for state flexibility, and state experimentation is discouraged. In evaluating the constitutionality of the Act, the Court should consider the desirable public policy of allowing state innovation.

E. *Control of land use and of mining is a traditional state function outside the scope of the commerce power.*

Although the decisions of the lower courts in the two *Surface Mining* cases both found that provisions of the Surface Mining Act exceeded congressional authority, the

courts diverged on the rationale used to support a finding of unconstitutionality. The Indiana district court found that land use planning was an activity outside the scope of interstate commerce, and thus regulation of the activity exceeded the enumerated powers of Congress. Jurisdictional Statement at 8a-19a, *Andrus v. State of Indiana,* No. 80-231. The Virginia court found that coal mining was excluded from national government regulation under the rationale of *National League of Cities, supra.* Jurisdictional Statement at 18a, *Andrus v. Virginia Surface Mining and Reclamation Association,* Nos. 79-1538 and 79-1596.

The amicus believes that the Indiana court's rationale is more accurate, and thus argues that land use control is beyond the regulatory power of Congress because it is outside the scope of interstate commerce.

The definition of interstate commerce has been greatly expanded by this Court since the New Deal. For example, before such expansive cases as *Wickard v. Filburn,* 317 U.S. 111 (1942), and *Katzenbach v. McClung,* 379 U.S. 294 (1964), this Court held that mining was not interstate commerce. *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936); *Oliver Iron Mining Co. v. Lord,* 262 U.S. 172 (1923); *Hammer v. Dagenhart,* 247 U.S. 251, 272 (1918) ("The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof.") Now, however, federal regulation of mining has become commonplace.

An overly broad definition of commerce has a strong impact on the federal system since the commerce clause has been the enumerated-power foundation for a wide variety of modern legislative action. Unfortunately, the resulting destruction of the federal system may overshadow many of the benefits achieved. The most serious usurpations of state authority should be minimized by a return to meaningful boundaries on the scope of interstate commerce.

Certainly the current conception of commerce raises the question of whether there is any remaining limit to the definition. If the grant of power to regulate commerce is to have any meaning short of power to regulate every aspect of the national economy, then this Court must find that some items are excluded from the definition of commerce. One of the clearest items for exclusion is land use regulation, as found in the Surface Mining Act. To say that something as uniquely stationary as land use may be regulated because it affects interstate commerce is to say that nothing is beyond the congressional commerce power.

Although, as noted above, the *amicus* considers the Indiana district court's analysis to be more accurate, the same conclusion of unconstitutionality is mandated by the Virginia court's analysis based on *National League of Cities, supra.* Under *National League of Cities,* a matter is excluded from the reach of congressional regulation if it interferes with an integral function of state government protected by the tenth amendment. 426 U.S. at 855.

National League of Cities does not exhaustively list activities that are "essential to separate and independent existence" of the states, 426 U.S. at 845, quoting *Lane County v. Oregon,* 74 U.S. (7 Wall.) 71, 76 (1869). Among the few activities identified are power to locate the seat of government, 426 U.S. at 845; obtaining income by taxation, *New York v. United States,* 326 U.S. 572 (1946); setting salaries for fire and police department employees, 426 U.S. at 851, 855; and (by implication from the overruling of *Maryland v. Wirtz,* 392 U.S. 183 (1968)) determining salaries for hospital and school employees.

Land use planning has traditionally been a local function, which has only recently risen even to the state level. It is a process that requires keen attention to site-specific details and community needs, and is therefore unsuited to nationwide regulation. The steep-slope provision in section

515 of the Act, 30 U.S.C. § 1265 (Supp. I 1977), the prime farmland provisions in sections 507, 508, 510, 515, and 519 of the Act, 30 U.S.C. §§ 1257, 1258, 1269, 1265, and 1269 (Supp. I 1977), and the other portions of the Act held to be unconstitutional by the district courts will seriously impede the process of local planning. These provisions displace state decisionmaking in an area that has heretofore remained one of the last bastions of state and local control.

Because land use regulation is a uniquely local function and because the Surface Mining Act would displace state decisionmaking with regard to this function, the Act should be declared unconstitutional as violating the federal structure of the Constitution.

II. BY FORCING MINE OPERATORS TO PURCHASE THEIR DUE PROCESS RIGHTS, SECTION 518(c) OF THE ACT UNCONSTITUTIONALLY CONDITIONS DUE PROCESS RIGHTS

In light of this Court's extensive discussion of the due process clause, section 518(c) of the Act must be struck down as violative of due process. Section 518(c) requires the prepayment of an assessed civil penalty as a condition of challenging the amount or validity of the penalty. 30 U.S.C. §1268(c) (Supp. I 1977). Not only are coal mine operators forced to purchase their right to contest the penalty, the present system in effect assumes guilt, not innocence, by forcing prepayment before the final determination of the amount and validity of the penalty.

As conceded in the Secretary of Interior's brief, a mine operator wishing to contest both the amount and the fact of the underlying violation *must* prepay the penalty as a condition of review. Brief of the Secretary of Interior at 68-69, *Andrus v. Virginia Surface Mining & Reclamation Association*, Nos. 79-1538 and 79-1596. This heavy burden on mine operators is allegedly justified by bureaucratic expediency in the collection of the penalty and the conten-

tion that, should a mine operator prevail on review, no financial harm is incurred due to the refund-with-interest provision of Section 518(c), 30 U.S.C. §1268(c) (Supp. I 1977). *Id.* at 70. In short, these justifications are simply inadequate to uphold this unprecedented, onerous burden on mine operators.

The desire to expedite the collection of penalties through prepayment cannot outweigh the right of mine operators to contest the amount and fact of the penalty. The purpose of the Act is not that of revenue raising. *See* section 102 of the Act, 30 U.S.C. § 1202 (Supp. I 1977). Thus, the rationale of decisions that uphold prepayment as necessary to effectuation of the government's interest in the collection of revenues is inapposite. *See, e.g., Phillips v. Commissioner,* 283 U.S. 589 (1931). Further, the contention that the prepayment is only a preliminary deprivation since the penalty is not final until the end of the review program, effectively ignores reality. Mine operators are denied the use of the funds placed in escrow. Since administrative and judicial review of the amount and fact of the penalty necessarily takes time, mine operators are completely deprived of the use of these funds for a potentially substantial period of time. As will be discussed *infra,* this deprivation of the use of these funds can have disasterous consequences. Thus, it is indeed a final, not preliminary, deprivation.

Not only is the contention that no financial harm will be incurred due to the refund-with-interest provision irrelevant, *see Stanley v. Illinois,* 405 U.S. 645, 647 (1972) ("This Court has not . . . embraced the general proposition that a wrong may done if it can be undone."), it too ignores reality. Under the Act, each violation can incur a civil penalty of up to $5,000, with each day of continuing noncompliance deemed a separate violation for assessment purposes. Section 518(a) of the Act, 30 U.S.C. § 1268(a). (Supp. I 1977). For a small mining concern with substantial monthly equipment payments and payroll commitments,

the diversion of operating funds to purchase its due process rights may well force it out of business. Even a temporary shutdown can have disasterous consequences that cannot be compensated by an eventual refund of the penalty with interest. *See Virginia Surface Mining & Reclamation Association, Inc. v. Andrus,* 483 F. Supp. 425, 444 (W.D. Va. 1980). When faced with this prospect, a mine operator is extremely susceptible to unjust coercion by the Office of Surface Mining. Allegedly improper practices may be changed solely due to the mine operator's need to maintain economic viability. This coercion, made possible by the prepayment provision, violates any notion of fundamental fairness.

Thus, since the purpose of the Act is not to raise revenue, since mine operators are potentially forced to choose between continued economic viability and the exercise of their constitutional right to due process, and since the refund-with-interest provision cannot fully compensate the mine operator if he prevails on review, fundamental fairness requires that operators be allowed to exercise their due process rights to exhaustion *before* they are forced to pay a disputed penalty.

CONCLUSION

The challenged provisions of the Surface Mining Act are outside the scope of congressional power. The Act regulates land use, which is a matter beyond the reach of the commerce power, or alternatively, a matter foreclosed from congressional action by the tenth amendment. Moreover, policy considerations militate against the centralized decisionmaking exemplified by the Surface Mining Act. Such centralization decreases public participation in government by lessening the potential impact of individual citizens and by confusing the traditional lines of political accountability. Centralization decreases government experimentation and flexibility, and it encourages the accumulation of power that the Founding Fathers sought to avoid. In its regulation of surface mining, Congress has overstepped its bounds to pursue a course which is neither constitutional nor desirable.

The Act also deprives mine operators of their procedural due process rights by requiring payment of penalties as a condition of seeking meaningful review. The prepayment provisions of the Act force operators to pay an unfairly high price for vindication of their constitutional rights.

The *amicus* respectfully urges the Court to affirm the judgments of the district courts insofar as they hold portions of Title V of the Surface Mining Act, 30 U.S.C. §§ 1251-1279 (Supp. I 1977), to be unconstitutional.

Respectfully submitted,

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On Appeal From the United States District Courts for the Western District of Virginia and the Southern District of Indiana

BRIEF OF AMICI CURIAE NATIONAL COAL ASSOCIATION AND AMERICAN MINING CONGRESS IN SUPPORT OF APPELLEES

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF OF AMICI CURIAE NATIONAL COAL ASSOCIATION AND AMERICAN MINING CONGRESS IN SUPPORT OF APPELLEES

INTEREST OF *AMICI*

Pursuant to Supreme Court Rule 36.2, the National Coal Association and American Mining Congress (NCA/AMC) file this brief on the merits as *Amici Curiae* in support of Appellees. Counsel for all parties have consented to the filing of this brief.

The National Coal Association (NCA) is a trade association whose members comprise a substantial percentage of the Nation's commercial coal-producing capacity. NCA was created to promote and encourage the use of coal; to cooperate with other industries, the public and state and federal officials on problems affecting the production and use of coal; and to promote the general welfare of the producers of coal and related industries on behalf of its member companies.

The American Mining Congress (AMC) is a trade association composed of United States companies that produce most of the Nation's metals, coal and industrial minerals; manufacturers of mining and mining processing machinery, equipment and supplies; and engineering and contracting companies and banks that serve the mining industry. AMC was created to serve as both a clearinghouse for information and a coordinator for action on behalf of the mining industry with regard to matters pending in Congress, the Executive Branch, and independent agencies; and to work for constructive policies that will best enable the mining industry to serve the needs of the Nation.

NCA/AMC and their members are profoundly affected by the legislation which the courts below held unconstitutional in these cases. If the decisions of the lower courts are not upheld, the interests of NCA/AMC will be substantially and adversely affected.

STATEMENT OF THE CASE

Congress enacted an awesomely comprehensive and detailed scheme for the national regulation of surface coal mining and the surface incidents of underground mining, the Surface Mining Control and Reclamation

Act of 1977, 30 U.S.C. § 1201 *et seq.* ("Act"). The measure provoked controversy of considerable intensity through five terms of Congress prior to enactment in 1977. (*See* 79-1538 & 79-1596 Appellant's App. at 1a-4a.)

The lower courts in both the Virginia (No. 79-1538) and Indiana (No. 80-231) cases considered the constitutionality of the Act on a wide range of grounds. As *amici* before this Court, NCA/AMC wish to focus the Court's particular attention on two provisions of the Act—Section 522, 30 U.S.C. § 1272, and Section 521 (a)(3), 30 U.S.C. § 1271(a)(3).

Section 522—entitled "Designating Areas Unsuitable for Surface Coal Mining"—declares mining an unsuitable land use for certain types of lands. Unsuitability is determined either because the land falls within a *per se* unsuitability category prescribed by Congress (§ 522(e)), or because the States make a determination of unsuitability under specific criteria mandated by Congress (§ 522(a)).

Section 521(a)(3), which is one of the "Enforcement" provisions of the Act, permits the summary closure of mining operations by federal inspectors without a hearing whenever a mine operator fails to abate in a timely manner a condition found improper by the inspector. Summary closure under the section is permitted regardless of how limited the potential environmental risks—if any exist[1]—and without re-

[1] For a variety of "technical" violations, there may be no actual environmental or other harm at stake: for example, a violation of the regulation which requires that durable and easily recognized signs be placed at all access points to the permit area, displaying certain identifying information. 30 C.F.R. § 715.12(a)-(b).

gard to whether the operator in good faith has disputed the inspector's findings.

NCA/AMC will address the Tenth Amendment and Fifth Amendment concerns which these two provisions raise. Application of these constitutional principles to these two narrow statutory provisions will hopefully frame issues representative of the wider range of constitutional issues which this Court will address in these cases.

SUMMARY OF ARGUMENT

I.

The unsuitability provisions of Section 522 of the Act have been challenged before this Court under three provisions of the Constitution—the Commerce Clause, the Tenth Amendment and the Fifth Amendment. With respect to Tenth Amendment issues on which this *amicus* brief will focus primarily,[2] the provisions of Section 522 are unconstitutional in two somewhat different respects.

First, Section 522(e)(4)-(5), which bans any mining within precisely 100 feet of a road, precisely 300 feet of a building, etc., represents an unconcealed effort to zone the local use of land—an objective absolutely unrelated to any federal interest. Section 522 (e)(5)'s prohibition of mining within precisely 100 feet of a cemetery, for example, has no relation to the environment, and no relation to any Commerce Clause concern; rather, it is a local land use statute imposed

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[2] NCA/AMC fully support appellees' claims of unconstitutionality under the Commerce Clause and Fifth Amendment but wish in the interest of space to direct principal attention toward Tenth Amendment arguments.

without variation by Congress on all States as to a matter of uniquely local concern. The Tenth Amendment prohibits so extraordinary an intrusion into matters traditionally local in nature.

Second, Section 522(a) provides an alternative scheme under which States may identify and declare certain historic, natural or other lands unsuitable for mining. The Tenth Amendment deficiency in this provision relates not to the fact that Congress has mandated any particular land use (the determination of whether to prohibit mining is actually left to the State) but to Congress' insistence that the federal government set all the rules by which this state determination will be made. And if the States fail to adopt any of these rules, the federal government itself must evaluate and declare private lands unsuitable for mining. Imposition of this federal control of the state decisionmaking process, although less direct, is a similarly invidious Tenth Amendment intrusion.

In addition to Tenth Amendment concerns, Section 522 raises unconstitutional "taking" issues under the Fifth Amendment which will also be briefly discussed.

II.

Section 521(a)(3) permits a federal inspector to shut down a mining operation without a hearing under circumstances which violate the Due Process Clause of the Fifth Amendment. Under the Act, the mine closure order will be issued whenever a mine operator fails to abate a violation alleged by the inspector during a prior visit to the mine site. Since other mechanisms are readily available to the government to advance any real need for immediate corrective

action, and because provision of a prior hearing will entail no significant additional governmental cost or administrative burden, a hearing is required by the Due Process Clause before the government shuts down a mine under Section 521(a)(3).

ARGUMENT

I. SECTION 522 EXCEEDS CONSTITUTIONAL LIMITATIONS IMPOSED BY THE TENTH AND FIFTH AMENDMENTS

Section 522 [3] has two basic thrusts. In Section 522 (e), Congress flatly prohibited surface mining [4] on an extensive variety of categories of lands. Included within the areas Congress dictated could not be used for mining are lands within 300 feet from occupied dwellings, public buildings, schools, churches, community or institutional buildings, and parks, as well as lands within 100 feet of the outside right-of-way line of any public road and within 100 feet of a cemetery. Section 522(e)(4)-(5).

Section 522(a), (c) and (d) (hereinafter referred to collectively as "(a)") operate differently. Rather than directly dictating land uses as in Section 522(e), in Section 522(a) Congress dictated the governmental processes by which States must make such determinations.[5] Congress demanded that each State establish a

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[3] We refer broadly to Section 522 but do not argue, and the courts below did not hold, that Section 522(b)'s provisions concerning federal lands are unconstitutional.

[4] Surface mining is broadly defined in the Act to include a wide range of collateral activities and areas, including the surface incidents of underground mining. *See* Section 701(28).

[5] Although phrased conditionally ("To be eligible to assume primary regulatory authority pursuant to section 503, each State shall . . ."), Section 522(a)'s command is actually mandatory. If a

process for land use analysis and decisionmaking, including "methods for implementing land use planning decisions" concerning mining. Section 522(a)(1)-(4). Congress mandated the rule of decision to be followed: Section 522(a)(2) requires the State to prohibit all or certain types of surface coal mining in areas additional to those already congressionally zoned against mining under Section 522(e) if the State determines that the reclamation required by the Act would not be feasible on those lands. In addition to Section 522 (a)(2)'s rule of decision, Section 522(a)(3) provides other criteria under which the State is granted discretion to prohibit mining on yet other categories of lands.

We believe the courts below correctly declared Section 522 unconstitutional. This statute probably exceeds even the plenary authority granted Congress under the Commerce Clause, but it surely violates both the Tenth Amendment and the Taking Clause of the Fifth Amendment. We focus our arguments on the Tenth Amendment as the constitutional provision most critically impaired when Congress asserts authority to zone the private land around local parks and cemeteries.

A. The Act Violates the Tenth Amendment.

Even if Section 522 might otherwise be sustained as a legitimate exercise of the commerce power,[6] it

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State does not obey the dictates of Section 522(a), the federal government will itself perform the function and make these land use decisions for the State and its localities. Sections 503, 504 (a)-(b).

[6] It should not be sustained under the Commerce Clause, however. Section 522(e) lacks the telic relation to legitimate federal

must be invalidated under the Tenth Amendment. Section 522 presents a very specific intrusion into traditional state regulation of land use. At issue, for example, with respect to Section 522(a)(4) are very localized concerns: should mining—which under Section 701(28) of the Act may involve simply the storage of supplies or other limited activities—be prohibited within precisely 100 feet of a public road? Or should it be prohibited within 500 feet or some other distance of such a road? Section 522(e)(5) presents similar questions of local concern: how close to a cemetery, for example, does a local community wish mining to proceed? If Congress can prohibit mining near cemeteries, what about other business activities or private uses?

The intrusion of Section 522(a), although different in kind, is similar in effect. Under the Department of Interior's applicable regulations,[7] broad categories of land (defined in 30 C.F.R. § 762.5) must be evaluated by state regulatory authorities through a process that must include petition rights to private parties, detailed record keeping requirements, notification requirements, detailed procedures for processing petitions, detailed procedures for conducting hearings before local authorities, detailed procedures for reaching decisions based on the materials presented at such hearing, and the creation of a data base and inventory system for evaluating all lands which could potentially be covered by petition. 30 C.F.R. § 764. Under Section

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concerns necessary to sustain it. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); D. Engdahl, *Constitutional Power: Federal and State, in a Nutshell* 33-34 (1974).

[7] States must adopt these regulations if they are to avoid direct federal determination of what lands are suitable for mining (Section 504).

504 of the Act, a failure of any State to enact any of these provisions in a form at least as stringent as the federal form[8] will result in imposition of a "federal program" under which the federal government will make its own decisions as to which state lands should be designated unsuitable for mining.

The intrusion on States' sovereignty here is pervasive and extreme. In order to evaluate this intrusion under the Tenth Amendment, we must deal first with the general principles which govern applicability of the Tenth Amendment and then more specifically with the particular respects in which Section 522 offends those principles.

1. *The Tenth Amendment Limits the Commerce Power.*

The Tenth Amendment operates as a limit on the federal power over interstate commerce. In *Fry* v. *United States,* 421 U.S. 542 (1975), Justice Marshall's opinion for the Court declared of the Tenth Amendment:

> [I]t is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

421 U.S. at 547 n.7. Subsequently, in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), the Court invalidated an exercise of congressional power admittedly otherwise authorized by the Commerce Clause because it transgressed considerations of federalism and state sovereignty protected by the Tenth Amendment.

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[8] The stringency requirement is reflected in Section 505 of the Act.

Japan Line, Ltd. v. *County of Los Angeles,* 441 U.S. 434, 449 n.13 (1979).

Although the precise contours of these Tenth Amendment limitations must be evaluated in the balance of governmental interests particular to each case, they emerge from venerable principles: that Congress may not "curtail in any substantial manner the exercise of [State] Powers," *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514, 523 (1926); that Congress may not diminish those powers and " 'functions essential to [the States'] separate and independent existence,' " *Coyle* v. *Smith,* 221 U.S. 559, 580 (1911), quoting from *Lane County* v. *Oregon,* 74 U.S. (7 Wall.) 71, 76 (1868); that there are "attributes of sovereignty attaching to every state government which may not be impaired by Congress," *National League of Cities,* 426 U.S. at 845; and that there must be "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris,* 401 U.S. 37, 44 (1971).

2. *The Act Exceeds Tenth Amendment Limitations.*

Section 522[9] of the Act offends constitutionally protected principles of federalism and state sovereignty in a number of ways. It usurps traditional state au-

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[9] Some of the arguments below are more applicable to Section 522(a) than (e) and vice versa. It is difficult, however, to distinguish where the constitutional offenses of the one leave off and those of the other begin and we generally have not attempted to do so.

thority over land use, it disrupts the State's exercise of its police powers to promote local community values, it subverts the State's authority over its range of taxing options particularly with respect to property taxes, and it dictates the processes which must govern a State's resolution of inherently state-related issues. One hundred senators and 435 congressmen may well have opinions on these matters as indeed they may have opinions on other matters of local concern such as the zoning of building heights, the creation of state amusement facilities, and the like. The inherently localized nature of these questions, however, overrides whatever federal interest there may be—if any—in imposing these opinions on each local authority.[10]

a. Usurpation of traditional local authority.

One way in which the Act offends state sovereignty and considerations of federalism is Section 522(e)'s intrusion into and usurpation of traditional local control over land and land use within state boundaries. In contrast to the federal government's lack of a general property power and lack of any historical re-

[10] Congress is not without alternative constitutional powers to obtain protection of whatever environmental or other interests may have prompted Section 522. Any land within the categories designated by Section 522 can still not be mined unless the mine operator complies with each of the stringent performance, permitting, bonding and other statutory and regulatory requirements implemented under the Act. Under the umbrella of congressional concern for effective reclamation of mined lands, however, Congress has sought to impose, through Section 522, Congress' own judgment that some lands—for health, safety or aesthetic reasons—ought not to be mined at all. The function of determining what activities should be permitted on what lands is a uniquely local function, tied to the requirements of the locality, and traditionally exercised by local governments under state authority.

sponsibility for real property law, the States and their subordinate localities have always been intimately connected with and responsible for the land and its regulation.[11]

The relationship of state and local governments with the land is multi-faceted and the facets themselves highly interdependent. The State, as successor to the Crown after the revolution, is the source and arbiter of rights in land, determining the incidents of ownership and how they may be conveyed or succeeded to. The State is the source and arbiter of the private law which regulates conduct, *inter alia,* with respect to the land, including the law of nuisance. Congress, in Section 522, interjects itself disruptively into this special relationship between the States and their lands.

b. Disruption and destruction of local government and self-determination.

The police power[12] of the States has long been applied to regulate the use of land for the protection of the public health, safety and welfare, as locally defined. *See, e.g., Welch* v. *Swasey,* 214 U.S. 91 (1909); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Thomas Cusack Co.* v. *City of Chicago,* 242 U.S. 526 (1917). Local governments, increasingly over most of this century, have employed the police power to control

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[11] The primacy of each State in governmental matters relating to land within its bounds is illustrated by the conflicts of laws principles governing real property issues. *See, e.g., Restatement (Second) of Conflict of Laws,* Ch. 9, Topic 2, Introductory Note (1971).

[12] *Amici* National Wildlife Federation ("NWF"), *et al.,* find constitutional authority for the Act in the *federal* "police power." (NWF Br. at 25.) We search our copy of the Constitution in vain for the source of this alleged federal power.

land use patterns through zoning regulations and comprehensive planning. *See, e.g., Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926).

Local governments have thus been responsible for and capable of protecting or promoting community values as locally deemed necessary. This traditionally exclusive power over local land use and development has enabled a community to pursue a particular locally-chosen style or quality of life. *Compare Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974) *and Agins* v. *City of Tiburon,* 100 S. Ct. 1832 (1980) *with Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978).

Thus, Section 522 not only usurps an area of traditional State and local function. It also threatens the identity of localities by dictating from Washington which lawful land uses may be conducted where, notwithstanding the values, preferences, and needs of people in those localities. More offensive yet, Congress threatens the very capacity for community self-determination and the viability of local democratic processes in shaping the community destiny. *Cf. James* v. *Valtierra,* 402 U.S. 137, 143 (1971). "This Court has emphasized the importance in a democratic society of preserving local control of local matters." *City of Rome* v. *United States,* 100 S. Ct. 1548, 1575 n.12 (1980) (Powell, J., dissenting).

c. Subversion of state and local fiscal viability.

A third major way in which the sovereignty and independence of the States are undermined stems from the threat to their fiscal viability which Section 522 represents. Among the critical variables inherent in

the land use decisionmaking calculus is the value of the property under different uses. The economic value of property will vary according to the use to which the land is or may be put. The importance to state and local governments of this variable in land use decisionmaking derives primarily from its effect on the property tax revenues on which they depend.

Ad valorem taxation of real property has, since the founding of the Republic, been the foundation of state and local fiscal integrity. It is beyond the constitutional reach of the federal taxing power and susceptible to plenary local control. The property tax is relatively highly correlated with benefit-burden taxation equity considerations with respect to local governmental services. It is the primary source of funding for traditional local services. Moreover, it facilitates local self-determination, permitting communities to make reasoned choices, for example, about how much they value parks and open spaces in lieu of other services or as compared with other land uses which would carry a larger share of the local tax burden. *Cf. Milliken* v. *Bradley,* 433 U.S. 267, 291 (1977); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973); *James* v. *Valtierra,* 402 U.S. 137, 143 (1971).

Although the degree of reliance on the property tax has diminished somewhat in recent decades, the property tax remains the overwhelming source of tax revenues for local governments. From 1942 when 92.4 percent of local tax collections came from the property tax, 79.7 percent of those collections were supplied by the property tax nationwide in 1978.[13] Advisory Com-

[13] Local governments in some states depend on the property tax to a lesser degree, of course, while in other states, it is their only

mission on Intergovernmental Relations, *Significant Features of Fiscal Federalism, 1979-80 Edition* 88 (1980). Although state governments themselves have decreased their dependence on the property tax over the same period, still more than a third of all state and local tax collections were furnished by the property tax in 1978. *Id.* at 87.

When the Congress interjects itself into the local land use decisionmaking process and dictates what private lands can be used for what purposes, it not only usurps traditional local authority but it strips away some further measure of a community's control over its destiny, and it threatens its very capacity for fiscal—and therefore functional—independence and viability. Constitutional principles of intergovernmental tax immunity testify to the critical nature of this federal intrusion. *See Massachusetts* v. *United States,* 435 U.S. 444, 453-60 (1978) (Brennan, J.).

d. Dictating state processes and decisions.

When Congress orders States, as it does in Section 522(a), to make certain land regulatory decisions and specifies how to do so, complete with which sorts of exceptions the State may permit (*e.g.,* Section 522 (a)(6)), it offends the Tenth Amendment in a fourth way. Congress, having decided for the States that land cannot be mined if it cannot be returned to its premining state (including its original contour), has dictated that each State must conduct a particular process of land use decisionmaking, in a State level agency, with particular administrative capabilities and re-

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effective revenue-raising device. *See* Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism, 1979-80 Edition* 88 (1980).

sources, staffed to the satisfaction of the Secretary of the Interior,[14] to operate in a particular manner "implementing land use decisions" reached by application of congressionally mandated decisional criteria. Section 522(a)(1)-(4). It is beyond question that this is a constitutionally forbidden exercise of congressional power "so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *National League of Cities*, 426 U.S. at 855.[15]

This is entirely different than the situation the Court faced in *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127 (1947). The federal imposition of Hatch Act requirements on state personnel systems there was upheld as a legitimate exercise of the federal spending power. Here, the States have no choice; they suffer the federal intrusion not as a price which must be paid to secure federal funds. The only choice a State has is to comply or be stripped of its traditional internal

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[14] *See, e.g.*, 30 C.F.R. § 731.14(i)-(k) (detailing what staffing information the State must furnish the Secretary).

[15] In a penetrating article, "Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy," 86 Yale L. J. 1196 (1977), considering the "near-plenary" power of Congress to require pollution control by private sources, Professor Richard Stewart noted:

> But the matter would be very different were Congress to invoke the commerce power as a justification for compelling state and local governments to implement federal environmental policies. There is no close precedent, historical or legal, supporting such an undertaking.

Id. at 1222, 1223. *See District of Columbia* v. *Train*, 521 F.2d 971, 992-95 (D.C. Cir. 1975), *vacated and remanded per curiam sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977) (Tenth Amendment prevents "compelled state regulation" and "forcing the states to supplant federal officials in policing the details of federal regulations").

administrative autonomy and control over local land by imposition of a "federal program" for that State. Section 504.

Professor Tribe has observed, with particular significance to this case,

> [N]o one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.

L. Tribe, *American Constitutional Law* 302 (1978). Here, Congress has gone beyond nibbling and feeds at the throat of our federal principles. *See Rizzo* v. *Goode,* 423 U.S. 362, 379 (1976); *see also* Stewart, "Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy," 86 Yale L.J. 1196, 1219-1250 (1977).

Even if the Court were to employ a balancing approach, *see National League of Cities,* 426 U.S. at 856 (Blackmun, J., concurring), Section 522 of the Act could not survive Tenth Amendment challenge. The fundamental nature of the jeopardy to which Section 522 subjects the constitutional interest in unimpaired state sovereignty in a federal system outweighs whatever incremental protection it might afford legitimate federal environmental concerns and interstate commerce.

This is particularly so because Section 522 advances its purposes so clumsily and crudely. Under Section 522(a) and applicable regulations (30 C.F.R. Part 764), state procedures for designating lands unsuitable for mining are prescribed down to the finest de-

tails. Where vulnerable Tenth Amendment values are so thoroughly implicated, federal power must be exercised with greater sensitivity and delicacy to minimize unnecessary damage to those values. *See Fry,* 421 U.S. at 547 n.7; *National League of Cities,* 426 U.S. at 853; *Younger* v. *Harris,* 401 U.S. at 44.

The "balance" is further skewed against Section 522 because there are less intrusive alternatives—and the Act itself employs them. Problem-specific, particularized environmental and health and safety protections are provided by the Act's permitting, bonding, and enforcement processes. *See, e.g.,* Sections 506-509, 520-521. In contrast, Section 522's meat axe approach—like that of several other sections of the Act such as the approximate original contour, steep slope, and prime farmland dictates[16]—"*unduly* interfere[s] with the legitimate activities of the States." *Younger* v. *Harris,* 401 U.S. at 44 (emphasis added).

B. Section 522 Violates the Fifth Amendment.

We adopt the arguments advanced by appellees that Section 522 also violates the Taking Clause of the Fifth Amendment. We here only emphasize for the Court that Section 522(e)'s "valid existing rights" exemption, at least as interpreted and implemented by Secretary Andrus, does not save that section from constitutional defect.[17] In addition, we wish to point out a unique factual consideration which is at the heart of the

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[16] The constitutionality of these other provisions will be discussed by other parties.

[17] By regulation, the Secretary defined "valid existing rights" so arbitrarily and restrictively as almost to constitute a null set. *See* 30 C.F.R. § 761.5. Although acknowledging that Congress intended,

"taking" issue. In the mining industry, mine operators frequently purchase property rights only in the underlying coal seam rather than in the surface. They own the coal, not the land. Where this is true, the prohibition of mining represents a complete taking of an operator's entire interest in coal. This widespread mining practice of acquiring only the coal rights makes *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), the governing precedent, as distinguished from *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978). The *Mahon* fact pattern is virtually identical to the issues raised by Section 522(e)(5). Effectively prohibiting any return on an operator's investment in severed coal rights, Section 522(e) deprives such property owners of the whole "bundle" of rights, not just one strand, and thus effects an unconstitutional taking. *See Andrus* v. *Allard,* 444 U.S. 51, 65 (1979).

II. THE DISTRICT COURT PROPERLY ENJOINED SECTION 521(a)(3) SUMMARY CESSATION ORDERS

The Act provides, in two circumstances, for summary issuance of orders requiring the immediate cessation of surface coal mining operations. Section 521(a)(2) requires issuance of a cessation order when a federal inspector determines that a condition or practice creates an imminent danger to public health

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by the exemption, to avoid taking property unconstitutionally, 44 Fed. Reg. 14992 (1979), the Secretary superimposed prerequisites with no Fifth Amendment basis. The United States District Court for the District of Columbia declined to reach the constitutionality of this regulation in *In Re Permanent Surface Mining Regulation Litigation,* C.A. No. 1144 (Feb. 26, 1980) and NCA/AMC's appeal of that ruling is pending before the Court of Appeals (No. 80-1810 *et al.*).

or safety or threatens imminent environmental harm. Section 521(a)(3) requires issuance of a cessation order for failure to abate an alleged violation, though the alleged violation creates no risk of imminent harm to people or the environment.

The District Court in Case Nos. 1538 and 1596 enjoined both varieties of summary cessation order on due process grounds. (1538 J.S. App. at 12a, 19a, 62a.) The Secretary has briefed only Section 521(a)(2) and we leave response to his argument to other litigants. We here address only the unconstitutionality of Section 521(a)(3).

Under Section 521(a)(3), in the absence of a condition posing an imminent danger to public safety, health, or the environment, a federal inspector who believes that a condition or practice violates the Act or a condition of the mining permit issued thereunder "shall issue" the permittee a notice of violation ("NOV"). The NOV sets a "reasonable time" for abatement of the violation—"but not more than ninety days"—and provides "opportunity for public hearing." *Id.*

The permittee may dispute the inspector's appraisal of the condition or practice: as a matter of its factual existence, its incidents, what must be done to constitute abatement to the inspector's satisfaction or the meaning or scope of the requirement which has been allegedly violated. It may be enormously, even prohibitively, expensive to do what the inspector believes is required for abatement, in which case, if he has any doubt the inspector isn't correct in all material respects, the permittee will likely want to contest the NOV and not abate the condition until adjudicatory

fact finding is complete and someone more knowledgeable in the law than the inspector tells the permittee he is wrong and must abate.

If the permittee believes that the NOV is improper and chooses not to abate, challenging the NOV and seeking an adjudicatory hearing by a neutral fact-finder under Section 525(a)-(b), he subjects himself to the possibility that, in the meantime, the inspector will shut down his mine with a Section 521(a)(3) cessation order. Even if the inspector, in his discretion, extends the abatement time to the maximum period, it is likely that time will run before the permittee's challenge is adjudicated. The more minor the violation, the shorter the abatement time the inspector will permit and, ironically, the more likely the mine will be shut down for failure to abate, without a hearing.

Consider the example of one of the more hotly contested issues which has arisen under the Act's interim regulatory program: the determination of which off-minesite coal processing facilities are subject to regulation. The Interior Board of Surface Mining and Reclamation Appeals has considered the issue over the last two years, evolving case-by-case a set of criteria for distinguishing coal processing facilities subject to the Act from those which are not.[18] Considering the

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[18] In June, 1979, the Interior Board of Surface Mining and Reclamation Appeals (Board) reversed the February 9, 1979 ruling of its administrative law judge that the coal processing facility operated by Western Engineering, Inc. was subject to regulation under the interim program. *Western Engineering, Inc.*, 1 IBSMA 202, 86 Int. Dec. 336 (1979). Since *Western Engineering*, the doctrine governing Office of Surface Mining jurisdiction over coal processing facilities has been substantially refined by the Board. *See, e.g., Virginia Iron, Coal and Coke Co.*, 2 IBSMA 165, 87 Int. Dec. 327 (1980); *Drummond Coal Co.*, 2 IBSMA 189, —— Int. Dec.

costs of compliance with the Secretary's regulations, the consequences of this determination are enormous for a facility operator.

A federal inspector, arriving at a coal processing facility, must make a complex determination whether the facility is subject to the Act.[19] Recognizing the unsettled and ambiguous nature of the calculus used to determine whether a particular facility must comply with the Act, an operator may well resist an inspector's NOV for failure to comply with some or all of the regulations and refuse to abate the alleged violation pending a full hearing of the issue. This reasonable reaction, however, exposes the operator to a cessation order under Section 521(a)(3) and to consequent economic loss, though the inspector may be proved wrong and the NOV invalidated after a hearing.

Alternatively, a permittee may believe that he has done all that is necessary to abate the alleged violation but the inspector disagrees, taking a different view of the facts or the requirements of the law in the matter. If the time for abatement has run, "[the inspector] shall immediately order a cessation" of mining. Section 521(a)(3).

—— (1980) (Drummond II); *Bethlehem Mines Corp.*, 2 IBSMA 215, —— Int. Dec. —— (1980); *Roberts Bros. Coal Co.*, 2 IBSMA 284, —— Int. Dec. —— (1980).

[19] If the inspector is familiar with the latest developments in the administrative case law, he will consider the distance in miles between the facility and the mine which supplies it with coal, the number of different mines supplying coal, and what economic nexi those mines have with the facility, whether the facility is functionally integrated with or otherwise operated in connection with nearby surface coal mines, and so on. *See, e.g., Roberts Bros. Coal Co.*, 2 IBSMA at 289-93, and the dissenting opinion of Judge Mirkin, 2 IBSMA at 296-97.

Although the permittee—*after* his mine is closed—may seek temporary relief from the Secretary (Section 525(c)) and, subsequently, from a court (Section 526 (c)), and has a right to an informal hearing (without a neutral factfinder) within thirty days (Section 521 (a)(5)), even if he prevails and the cessation order is stayed or revoked, he could be out of business. As the court below correctly found, many small coal companies operate very close to the margin and a few days' loss of production can make the difference between viability and bankruptcy. (*See* 79-1538 J.S. App. at 71a.)

Whether Section 521(a)(3) cessation orders constitutionally may issue without prior notice and opportunity for a hearing may be determined by resort to the balance of interests test established in *Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976). Under *Eldridge,* the Court must weigh three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

As to the first of these factors, *i.e.* the private interest at stake, the economic hardship on a mine operator can be enormous. Lost production will generally be valued at thousands of dollars a day, sometimes tens of thousands.

As to the second factor, *i.e.* the risk of erroneous deprivations under the present scheme, one inspector evaluating complex environmental conditions and applying somewhat amorphous concepts of environmental regulation in a new, largely untested scheme is far more prone to error than an administrative law judge who has had the benefit of adversary proceedings and expert testimony.

As to the third factor, the Government's interest in obtaining prompt abatement of improper practices or conditions is already protected by Section 518(h)'s provision for minimum daily penalties of $750 for each day of non-abatement after the date set in the NOV.[20] Moreover, if the need for expeditious action to protect the environment or public health and safety arises, that interest is already being fully protected by Section 521(a)(2)'s provision for imminent danger orders[21] and Section 521(c)'s provision for civil actions for judicial relief, including temporary injunctive relief.

Moreover no added fiscal or administrative burden must be incurred by the government to afford the permittee an adjudicatory hearing on the validity of the NOV or the adequacy of abatement before it orders cessation of mining for failure to abate. The hearing is statutorily already provided for.[22] Merely its *timing*

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[20] Criminal sanctions are also available as a deterrent to willful violations of the Act or permit conditions or noncompliance with a cessation order, *inter alia*. *See* Section 518(e)-(f), 30 U.S.C. § 1268(e)-(f).

[21] We acknowledge that this provision may also be unconstitutional, as argued by other parties.

[22] Actually, two different hearings are potentially provided, one to review the NOV and one to review the cessation order after the fact. Section 525(a)-(b), 30 U.S.C. § 1275(a)-(b).

must be adjusted relative to the occurrence of economic deprivation under a cessation order. Since no significant governmental interest is jeopardized by the altered sequence, due process requires it here.

The balance is one-sided. Due process requires a hearing before the Secretary may shut down a mine for failure to abate an alleged violation of a permit or the Act. Section 521(a)(3) provides otherwise and is unconstitutional.

CONCLUSION

For the reasons more specifically set forth above, NCA/AMC request that Sections 522(a), 522(e)(4)-(5), and 521(a)(3) be declared unconstitutional and the decisions below affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

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v.

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DATED: November 20, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Does Section 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977 ("Act"), 30 U.S.C. § 1271(a)(2), providing for summary cessation of mining activity in two carefully defined hazardous situations, violate the Due Process Clause of the Fifth Amendment to the Constitution?

2. Does Section 518(c) of the Act, 30 U.S.C. § 1268(c), providing for the payment into interest-bearing escrow accounts of proposed civil penalty assessments, after an opportunity for an informal hearing, violate the Due Process Clause of the Fifth Amendment to the Constitution?

3. Do Section 510(d), concerning reclamation of prime farmland, Sections 515(d) and (e), concerning return of land to approximate original contour, and Section 522, concerning designation of certain lands as "unsuitable" for mining, violate the Taking Clause of the Fifth Amendment to the Constitution? *

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* A number of other important questions are presented on these appeals, which due to limited resources Amici will not brief. As to these other questions, however, Amici fully support the position of Appellants Cecil D. Andrus, *et al.* as set out in their briefs.

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 36.2, the above listed organizations file this brief as Amici Curiae in support of Appellants. Counsel for all parties have consented to the filing of this brief.

The National Wildlife Federation (NWF) is the country's largest non-governmental conservation organization. It was incorporated under the laws of the District of Columbia in 1939 and is dedicated to the wise use and management of the country's natural resources. Members of the Federation's state affiliate organizations in each of the fifty states, Guam, Puerto Rico, and the Virgin Islands, combined with NWF's own individual associate members, total more than four million persons.

The Appalachian Coalition is a non-profit corporation incorporated in the State of Tennessee composed of citizen groups concerned with the issue of strip mining in six central and southern Appalachian states.

The Council of the Southern Mountains, Inc., is an Appalachian-based, community-oriented, non-profit organization. The Council has been deeply involved in the issues surrounding strip mining in central Appalachia for many years.

Save our Cumberland Mountains (SOCM) is a non-profit citizen's group, based in Tennessee, whose purpose is to improve the quality of life in the coalfields. SOCM draws its membership from and is governed by local residents.

The Tug Valley Recovery Center (TVRC) is a non-profit citizen group incorporated in the State of West Virginia. Its membership is composed primarily of low income citizens of the Tug Valley and Mingo and McDowell Counties of West Virginia.

Amici's members are directly affected by the impacts of surface mining. Amici share a deep concern for the protection of the human and natural environment from

abusive surface mining practices, as envisioned and mandated by Congress under the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, 30 U.S.C. § 1201 *et seq.*

STATEMENT OF THE CASE

After many years of hearings, debates, and unsuccessful attempts at legislation, Congress passed and the President signed the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, 30 U.S.C. § 1201 *et seq.* As passed, the Act represents a careful balance between the need for the protection of significant human and environmental values and the production of coal. *See, e.g.*, 30 U.S.C. § 1201; H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 57-60, 71-73 (1977); S. Rep. No. 95-128, 95th Cong., 1st Sess. 49-53 (1977).

As is true with numerous environmental statutes, the Surface Mining Act grew out of the failure of state governments to control adequately the surface mining of coal. As Representative Udall, Chairman of the House Committee on Interior and Insular Affairs, stated,

> The accumulation of environmental damage from mining is astounding . . . [and] the legislative efforts to control mining . . . can be characterized as "too little too late". . .

Hearings before House Subcommittee of the Committee on Interior and Insular Affairs, on H.R. 3 and Related Bills, 93rd Cong., 1st Sess. (1973), Part I, p. 745 [hereinafter *1973 Hearings*]. The Senate Committee on Energy and Natural Resources similarly concluded that "most existing State laws . . . for surface mining and reclamation are inadequate. . . ." S. Rep. 95-128, *supra*, at 51.[1]

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[1] A more detailed discussion of the economic and political causes behind the "disappointing State regulation" can be found in H.R. Rep. 93-1072, 93d Cong., 2d Sess. 61-63 (1974).

The States' failure to regulate coal mining forced the public to pay significant environmental and social costs. As the Senate Committee stated:

> Surface coal mining activities have imposed large social and environmental costs on the public at large in many areas of the country in the form of unreclaimed lands, water pollution, erosion, floods, slope failures, loss of fish and wildlife resources, and a decline in natural beauty. Uncontrolled surface coal mining in many regions has effected a stark, unjustifiable and intolerable degradation in the quality of life in coal communities.

Id. at 50.[2]

Certain coal states and the coal industry, which have bitterly opposed the strict regulation of mining activity, have challenged the constitutionality of key provisions of the federal legislation. Two such cases, in which significant provisions of the Act were struck down, are now before this Court.

SUMMARY OF ARGUMENT

1. *Section 521(a)(2) of the Act, providing for summary cessation of mining activity in certain circumstances, does not violate procedural due process.* Section 521(a)(2) provides for the Secretary of the Interior or his authorized representative to order the summary cessation of mining activity whenever either "imminent danger to the health and safety of the public" or "sig-

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[2] The Committee noted:

> Each week some 1,000 acres of land are disturbed by the surface mining of coal. As of January 1, 1972, . . . 1.7 million acres . . . were disturbed. . . . Only about half these lands have been reclaimed. . . .

Id. at 51.

Representative Udall noted that "In Appalachia alone, [thousands of] . . . miles of streams are continuously polluted by acid drainage and siltation from mining [both underground and surface]." 1973 Hearings, at 745.

nificant, imminent environmental harm" exists. 30 U.S.C. § 1271(a)(2). This Court repeatedly has upheld the right of the government to take summary action to protect interests of paramount public or governmental importance such as public health or safety. *Fuentes* v. *Shevin*, 407 U.S. 67, 91-93 (1972). All that is constitutionally required in such instances is an opportunity for a hearing "at some stage" of the process. *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950). The Surface Mining Act provides a prompt post-deprivation hearing. 30 U.S.C. § 1275(c), § 1271(a)(5), and §§ 1275(a) and (b).

2. *Section 518(c) of the Act, providing for payment into escrow of proposed civil penalty assessments, does not violate procedural due process.* Under the Act and the Secretary's implementing regulations, the mine operator is afforded two opportunities for informal hearing prior to payment of proposed penalties into escrow: first, an opportunity for a written submission; and second, an opportunity for an informal conference. 30 C.F.R. Parts 723 and 845. This provides greater procedural safeguards than are constitutionally required, given "the private and governmental interests at stake here and the nature of the existing procedures." *Mathews* v. *Eldridge*, 424 U.S. 319, 341 (1976).

3. *Sections 515(d) and 515(e) concerning return of mined land to approximate original contour, Section 510 (d) concerning reclamation of prime farmland, and Section 522 which designates certain land as "unsuitable" for mining, do not violate the "taking" clause of the Fifth Amendment.* The Court need not reach the taking issue raised by the Appellees below since the Appellees in the Virginia case failed to identify particular pieces of property that had been taken and the Appellees in the Indiana case never applied for permits to mine land. Also, in neither case did Appellees seek any administrative relief from the requirements they challenge.

This Court in determining whether a taking has occurred should weigh the various relevant private and public interests. *Agins* v. *City of Tiburon*, 100 S. Ct. 2138, 2141 (1980). The public benefits of the relevant sections of the Surface Mining Act clearly outweigh any burden on private parties.

Finally, both the Virginia and Indiana District Courts misapplied this Court's holding in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). That decision concerned the adjudication of private rights and not the exercise of the police power which is at issue in the Surface Mining Act.

ARGUMENT

I. SECTION 521(a)(2) OF THE ACT, PROVIDING FOR SUMMARY CESSATION OF MINING ACTIVITY IN TWO CAREFULLY DEFINED HAZARDOUS SITUATIONS, DOES NOT VIOLATE THE FIFTH AMENDMENT GUARANTEE OF PROCEDURAL DUE PROCESS

Section 521(a)(2) of the Act provides for the summary cessation of mining activity in two hazardous situations: (1) whenever an "imminent danger to the health and safety of the public" exists, or (2) whenever a condition or practice exists which is causing or can reasonably be expected to cause "significant imminent environmental harm". 30 U.S.C. § 1271(a)(2). These two statutory terms are carefully defined in the Act itself or in the Secretary's implementing regulations and meet the due process standards established by the precedent of this Court.[3]

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[3] In *Andrus* v. *Virginia Surface Mining and Reclamation Association, Inc., et al.*, No. 79-1538, the district court ruled that Section 521(a)(2) of the Act violates the procedural due process guarantees of the Fifth Amendment to the Constitution, because in the court's view, the statute does not provide sufficient guidance concerning those circumstances in which the issuance of summary cessation orders is appropriate. (VSMRA J.S., App. C, 19a, App. D, 57a-74a).

An "imminent danger to the health and safety of the public" is defined by statute to mean:

> [T]he existence of any condition or practice, or any violation of a permit or other requirement of this Act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement.

30 U.S.C. § 1291(8).

A "significant, imminent environmental harm" is defined by the Secretary's implementing regulations as follows:

> (i) An environmental harm is any adverse impact on land, air, or water resources, including but not limited to plant and animal life.
>
> (ii) An environmental harm is imminent if a condition, practice or violation exists which (a) is causing such harm or (b) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under section 521(a)(3) of the Act.
>
> (iii) An environmental harm is significant if that harm is appreciable and not immediately reparable.

30 C.F.R. § 700.5 and § 701.5.[4]

This Court has upheld the right of the government to take summary action to protect interests of paramount

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[4] A cessation order issued under these provisions remains in effect until the hazardous condition or practice is abated, or the order is modified, vacated, or terminated by the Secretary. 30 U.S.C. § 1271(a)(2). Lesser sanctions are issued where a violation exists but does not constitute an imminent hazard. *See* 30 U.S.C. § 1271(a)(3).

public or governmental importance in numerous instances. *Memphis Light, Gas and Water Division* v. *Craft*, 436 U.S. 1 (1978); *Fuentes* v. *Shevin*, 407 U.S. 67, 91-93 (1972); *Boddie* v. *Connecticut*, 401 U.S. 371, 279 (1971); *Sniadach* v. *Family Finance Corporation of Bay View*, 395 U.S. 337, 339 (1969).

Protection of the health and safety of the public constitutes a paramount governmental interest which justifies summary action. Indeed, deprivation of property without prior notice or hearing for the protection of the public health and safety is "one of the oldest examples" of permissible summary action. *Ewing* v. *Mytinger & Casselberry, Inc.*, 399 U.S. 594, 599-600 (1950).[5]

In *Ewing* v. *Mytinger & Casselberry, Inc., supra*, the Court upheld the multiple seizure of several lots of a food supplement without a prior hearing, not because the product was dangerous, but because it was labeled in a misleading fashion. In so doing, the Court said:

> It is said that these multiple seizure decisions of the Administrator can cause irreparable damage to a business. And so they can . . . Discretion of any official may be abused. *Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.* One of the oldest examples is the summary destruction of property without prior notice or hearing for the protection of public health. There is no constitutional reason why Congress in the interests of consumer protection may not extend that area of control [to articles sold in a misleading manner]. . . A requirement for a hearing, as a matter of constitutional right, does not arise merely because the danger of injury may be more apparent or immediate in the one case than in the other. . .

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[5] *See also, Mackey* v. *Montrym*, 443 U.S. 1 (1979); *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908).

That is a decision for Congress, not for us. [Emphasis added] [citations omitted].

339 U.S. at 599-600.

In providing summary administrative powers to deal with hazardous situations, therefore, the Surface Mining Act is fully consistent with the well established case law of this Court.[6]

In upholding summary actions of the government to protect the public health and safety against due process challenges, this Court has stated that it is not a requirement of the process that there be judicial inquiry before discretion is exercised if there is "at some stage" an opportunity for a hearing. *Ewing* v. *Mytinger and Casselberry, Inc., supra,* 339 U.S. at 599-600. In the instant situation, mine operators are afforded a prompt and adequate post-deprivation hearing. In fact, they have an opportunity for several post-deprivation hearings. First, following the issuance of a cessation order, the operator may petition the Secretary for temporary relief pending a final determination of the legality of the cessation order. On such a petition, the operator is entitled to a hearing and an interim decision within no more than five days.[7] 30 U.S.C. § 1275(c). Second, following the issuance of a cessation order, the operator may request informal mine site review, and if no such informal hearing is held within 30 days, the order automatically expires. 30 U.S.C. § 1271(a)(5); 30 C.F.R. § 722.15 and § 843.15. Third, whether or not the op-

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[6] The U.S. District Court for the District of Columbia in *In Re Surface Mining Regulation Litigation,* 456 F.Supp. 1301 (D.D.C. 1978), expressly upheld the constitutionality of § 521(a)(2) in the face of a due process challenge. *See also, Star Coal Co.* v. *Andrus,* Civ. No. 79-171-2 (S.D. Iowa, February 13, 1980), Slip Op. 17-18.

[7] Interim relief may be granted, after an informal public hearing, if the applicant demonstrates a substantial likelihood of success on the merits and the relief sought will not adversely affect public health or safety or cause significant, imminent environmental harm. 30 U.S.C. § 1275(c).

erator seeks temporary relief or mine site review of the cessation order, he may apply for a full formal review of the cessation order under § 525(a) of the Act, which provides an adjudicatory hearing conducted according to the Administrative Procedure Act, 5 U.S.C. § 554. 30 U.S.C. § 1275(a). If an operator requests such a hearing, the Secretary must hold the hearing and issue a decision within 30 days after the filing of the application. 30 U.S.C. § 1275(b).

The lower court apparently did not take issue with any of the above principles. Rather, the District Court based its decision on the unconstitutionality of the cessation order on the grounds that the standards under which the § 521(a)(2) cessation orders may be issued are too vague, subjective, and broad.[8] This is patently incorrect. The imminent hazards covered by the summary cessation authority of § 521(a)(2) are carefully defined by the statute and the Secretary's implementing regulations.[9]

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[8] The district court also ruled that, once Congress has provided the more objective guidelines the court deemed necessary, the statute would remain constitutionally deficient because it provides under Section 525(c) for an interim relief determination by the Secretary within five days rather than the twenty-four hour period preferred by the court. 30 U.S.C. § 1275(c). (VSMRA J.S., App. D, 73a). The five day period, however, is a statutory maximum. There is no indication in the record that the Secretary has not c will not act in less than five days. In any event, the five day period is eminently reasonable.

[9] Congress gave considerable thought to the issuance of cessation orders and set certain parameters for their use. On the one hand, Congress determined that the type of damage inherent in properly run operations should not normally provoke cessation orders. S. Rep. 94-28, 94th Cong., 1st Sess. 181 (1975).

On the other hand, Congress recognized that in certain circumstances, depending on local geological, hydrological, or other conditions, even efforts at full compliance with the Act's performance standards cannot prevent severe environmental harm. Therefore, it specified that the standards for significant environmental harm should remain flexible and that

> the closure authority of section . . . [521(a)(2) must not be restricted] to violations of the Act or permit. Instead, any

These definitions are sufficiently specific to control governmental action, to reduce the risk of erroneous deprivation, and in fact are quite similar to standards already upheld by this Court. *See e.g., Ewing* v. *Mytinger & Casselberry, Inc., supra,* 399 U.S. at 595 ("dangerous to health . . . or would be in material respect misleading to the injury or damage of the purchaser or consumer"); *Fahey* v. *Mallonee,* 332 U.S. 245, 250-251 n. 1 (1947) ("is unsafe or unfit to manage a federal savings and loan association" or "[i]s in imminent danger of becoming impaired"); *Air East, Inc.* v. *National Transportation Safety Board, supra,* 512 F.2d at 1232 ("emergency requiring immediate action . . . in respect to air safety in commerce").[10]

The lower court was wrong in holding unconstitutional the summary cessation authority of § 521(a)(2) of the Surface Mining Act, where imminent hazards to the public and the environment are at stake.[11] That pro-

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condition or practice giving rise to imminent danger or environmental harm is sufficient to invoke the authority.

S. Rep. 95-128, *supra,* at 91. *See also,* H.R. Rep. 95-218, *supra,* at 130.

Given this need for flexibility, Congress stressed the need for giving primary enforcement authority to field inspectors who "are in the best position to recognize and control compliance problems". S. Rep. 95-128, *supra,* at 90.

[10] In *Sink* v. *Morton,* 529 F.2d 601 (4th Cir. 1975), the Fourth Circuit upheld the constitutionality of the summary enforcement power in Section 104(c) of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 814(c), which was amended by the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290. *See* 30 U.S.C. § 801 *et seq.* (Supp. I) Section 104(c) was redesignated section 104(d) but was not changed in any material respect.

[11] The lower court's Order dated January 21, 1980, (VSMRA J.S. App. A) clarifying its original Order dated January 3, 1980, (VSMRA J.S., App. C) limits the scope of the Court's ruling to § 521(a)(2) cessation orders and does not strike down § 521(a)(3) cessation orders issued for failure to abate a violation as required by a prior notice of violation. 30 U.S.C. § 1271(a)(3). Thus it is

vision fully comports with the procedural due process requirements of the Fifth Amendment to the Constitution, and this Court should reverse the decision below.

II. SECTION 518(c) OF THE ACT, PROVIDING FOR THE PAYMENT INTO INTEREST-BEARING ESCROW ACCOUNTS OF PROPOSED CIVIL PENALTY ASSESSMENTS, AFTER AN OPPORTUNITY FOR AN INFORMAL HEARING, DOES NOT VIOLATE THE FIFTH AMENDMENT GUARANTEE OF PROCEDURAL DUE PROCESS

Section 518(c) and the Secretary's implementing regulations require that a mine operator who is formally assessed a civil penalty pay the proposed penalty into an escrow account, pending a formal adjudicatory hearing and final assessment determination. 30 U.S.C. § 1268 (c) ; 30 C.F.R. § 723.18 and § 845.19.[12]

Under existing due process standards, the escrow payment provision would afford adequate procedural due process even without any provision for a pre-deprivation hearing.[13] This Court, however, need not reach that is-

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not among the "questions presented" as set forth by the Court in noting probable jurisdiction.

[12] The district courts in *Andrus* v. *VSMRA*, *supra* and *Andrus* v. *Indiana*, No. 80-231, ruled that the escrow provision of Section 518 (c) violates the procedural due process requirements of the Fifth Amendment to the Constitution. In the former case, the court apparently misunderstood the civil penalty scheme as providing for a final assessment prior to an opportunity for a hearing, whereas the Act clearly provides that assessments made prior to a hearing are merely "proposed" assessments. 30 U.S.C. § 1268(c) (VSMRA J.S., App. A, 2a-3a, App. C, 19a, and App. D, 67a-69a, 74a). In both cases, the courts ignored the opportunity for a hearing prior to the payment into escrow of proposed civil penalties. (*Id.*; Indiana J.S., App. A, 42a-44a).

[13] As Mr. Justice White wrote in *Arnett* v. *Kennedy*, 416 U.S. 134, 187 (1974) (concurring and dissenting opinion) "[i]n passing upon claims to a hearing before preliminary but nonfinal deprivations, the usual rule of this Court has been that a full hearing at some time suffices."

sue, since the regulatory scheme provides an opportunity for a pre-deprivation hearing which fully satisfies even the most stringent procedural due process requirements. Indeed, it affords greater procedural safeguards than are constitutionally required, given "the private and governmental interests at stake here and the nature of the existing procedures." *Mathews* v. *Eldridge*, 424 U.S. 319, 340 (1976).

To determine the measure of due process afforded coal operators in civil penalty assessments, it is necessary to understand the civil penalty assessment system for violations of the Act and regulations.[14] Upon observation of a violation, a federal mine inspector issues to the coal operator a notice of violation or cessation order. Upon receipt of the sanction, and prior to the determination of a proposed civil penalty by a federal assessor, an operator may submit in writing any information, argument, or evidence relevant to the fact of violation or a prospective penalty. Under the regulations the Secretary must consider the submission in proposing any civil penalty. 30 C.F.R. § 723.16(a) and § 845.17(a).

In *Mathews* v. *Eldridge*, *supra*, this Court held that the opportunity for a written submission, prior to tem-

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[14] The finding of violation is made by a highly trained field inspector who has visited the minesite and observed first-hand the conditions and practices there. 30 U.S.C. §§ 1271(a)(2) and (3). While the inspector must apply the law to the factual circumstances he observes, mining conditions and practices are regulated by extremely detailed statutory and regulatory provisions, removing uncertainty in the vast majority of fact situations. 30 C.F.R. Parts 715, 716 and 717.

Once enforcement action is taken the matter is referred to an assessment specialist in Washington, D.C., to determine the appropriate civil penalty, if any. Under § 518(a) of the Act, the assessment of civil penalties is discretionary with respect to notices of violation and mandatory with respect to cessation orders. 30 U.S.C. § 1268(a). The Secretary's implementing regulations establish with particularity those instances in which assessments will be made for notices of violation. 30 C.F.R. Parts 723 and 845.

porary deprivation of a property interest, satisfied due process requirements. 424 U.S. at 344-348. The private interest at stake was the termination of an individual's social security disability benefits (424 U.S. at 340-344) and the only governmental interest was the conservation of fiscal and administrative resources. 424 U.S. at 347-348. Even in this context, this Court found that written submisions by benefit recipients were constitutionally sufficient to address factual issues concerning the individual's medical condition and ability to engage in substantial and available gainful work. Written submissions by mine operators, therefore, are clearly sufficient to address the narrow factual and legal issues concerning specific minesite conditions or practices observed by a federal inspector.

In the instant situation, moreover, the Secretary has provided not only for submission of written information before the escrow payment but also for an informal hearing before the escrow payment. Under the regulations, if the Secretary proposes a civil penalty assessment,[15] the operator may request an informal hearing, before an official other than the inspector or assessor, to review the assessment, and the Secretary must consider all relevant information submitted by the operator. 30 C.F.R.

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[15] Once a determination is made to assess a civil penalty, the amount is determined by reference to four statutory criteria: (1) the mine's history of previous violations; (2) the seriousness of the violation; (3) whether the operator was negligent; and (4) the operator's good faith efforts to achieve rapid compliance once cited. 30 U.S.C. § 1268(a). To insure the uniform application of these criteria to the greatest extent possible, the Secretary has adopted a point system, under which a range of points is assigned to each criterion. The assignment of points, for the most part, is geared to objective criteria. The total number of points assigned for the four criteria give rise to a specific dollar figure. *See* 30 C.F.R. Parts 723 and 845.

This system minimizes, to the greatest extent possible, the risk of error in proposing civil penalty assessments.

§§ 723.17 and 845.18.[16] Only if the informal hearing results in no agreement must the operator, if he chooses to contest the assessment, place the amount of the proposed civil penalty into an escrow account pending formal review.

In *Memphis Light, Gas and Water Division* v. *Craft*, 443 U.S. 1 (1978), this Court required only an informal consultation prior to termination of municipal utility service, which the Court stated was a necessity of modern life and whose discontinuance might threaten health and safety. Under § 518(c), provision for such an informal hearing is made, despite the fact that the operators' interest does not approach the public health and safety in importance.

Under the § 518(c) escrow provision, therefore, the operator and the Secretary are well along in the civil penalty process before any escrow payment is required. The operator has had an opportunity for both a written and an oral presentation of his arguments and evidence before the escrow payment is required. The escrow payment is required only to continue a challenge to the assessment through a formal adjudicatory hearing. Once the escrow requirement is met, the operator receives a full adjudicatory hearing, subject to 5 U.S.C. § 554, conducted by an administrative law judge and with an appeal to an administrative board. 30 U.S.C. § 1268(b).[17]

The issue presented by this case, therefore, is whether a full *evidentiary* hearing is required prior to a temporary deprivation of the operator's property interest. As

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[16] Such a provision for holding informal conferences, after proposed assessments are issued and before any escrow payment is required, is fully consistent with the statute to the extent that the conferences are held and the subsequent assessment, if any, is paid or forwarded for escrow within 30 days of issuance of the proposed civil penalty. *See* 30 U.S.C. § 1268(c).

[17] The Secretary's final assessment determination is subject to judicial review. 30 U.S.C. § 1276(a)(2).

stated by the Court in *Mathews* v. *Eldridge, supra*, "[t]he ordinary principle, established by our decisions, [is] that something less than an evidentiary hearing is sufficient prior to adverse administrative action." 424 U.S. at 344. Indeed, this Court has required an evidentiary hearing prior to temporary deprivation by government authorities in only one case, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).[18] This was required because the property interest involved was the termination of welfare payments, which were necessary for personal subsistence pending a final eligibility determination. *Mathews* v. *Eldridge, supra*, 424 U.S. at 340-341. At the same time, the sole governmental interest was in conserving fiscal and administrative resources. *Goldberg* v. *Kelly, supra*, 397 U.S. at 266-267.[19]

The private and governmental interests involved in the escrow payment provision stand in sharp contrast to those in the *Goldberg* v. *Kelly* case. The private interest is far less significant, and the governmental interest far greater in the instant situation. The private interest of the mine operator is nothing more than the forfeiture of the opportunity to use the funds placed in escrow for the duration of formal administrative review proceedings.[20] It involves only the temporary deprivation of a

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[18] *Mathews* v. *Eldridge, supra*, 424 U.S. at 340.

[19] The Court in *Goldberg* v. *Kelly, supra*, determined that, in the welfare termination context, anything less than an evidentiary hearing was inadequate. In that context, the "credibility and veracity" of witnesses was at issue covering circumstances presumably *not* observed firsthand by the agency or from which further factual inferences were drawn by the agency. *Id.* at 256 n.2, 268-269. The sole respect in which the prior hearing procedures in the instant case differ from the prior hearing procedures required in the *Goldberg* v. *Kelly* case, therefore, is in the right to confront any adverse witnesses. *Id.* at 268.

[20] The inability of an operator to pay proposed civil penalties into escrow poses a separate and limited problem, due to the waiver of legal rights to challenge proposed assessments upon failure to meet the escrow requirement. 30 U.S.C. § 1268(c). It would be a

relatively small sum of money for a relatively short period of time.[21] If the operator succeeds in vacating or reducing the civil penalty assessment, funds are returned within thirty days with interest at a rate of 6% or the prevailing Treasury Department rate, whichever is greater. 30 U.S.C. § 1268(c). The operator's property interest, therefore, is only the possible loss resulting from his inability to use the funds to earn a return greater than the prevailing interest rate.

The governmental and public interest in the escrow requirement, on the other hand, weighs heavily in favor of its constitutionality. The procedure in Section 518(c) of the Act for payment of proposed penalties into escrow promotes the expeditious review of penalty assessments by removing the incentive for delay, and guarantees the prompt collection of penalties owing the government upon a final penalty determination. The streamlined procedure is necessary to insure that the civil penalty is an effective enforcement tool and deterrent to unlawful and socially harmful conduct.

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reasonable exercise of the Secretary's authority, however, in implementing § 518(c) to waive the escrow requirement upon a clear showing of financial inability to pay. Under well-established principles of statutory construction, neither the Secretary nor the courts should construe a statutory provision in such a fashion as to render it unconstitutional when it may be construed in another fashion consistent with constitutional requirements.

[21] The amount of funds placed in escrow typically is not large. In 1979 the average civil penalty was $1,471.70. *Mine Regulation & Productivity Report.* Vol. 4, No. 19, McGraw-Hill, Inc. (May 16, 1980), p. 3. Civil penalties, moreover, were assessed in 1979 at a rate of one penalty for every two surface mining and reclamation operations nationwide. *See, Council of the Southern Mountains, Inc., et al.* v. *Andrus,* C.A. No. 79-1521 (D.D.C. 1980), Defendant's Response to Plaintiffs' First Request for Admissions, ¶ 16 (filed February 25, 1980) (The Secretary's best estimate of the number of surface mining and reclamation operations nationwide, as of October 9, 1979, was 14,315 units.). The average assessment, therefore, is a negligible amount of money for most coal operators.

Congress placed the escrow provision in the Act to achieve precisely those purposes. The Act's basic civil penalty program is modeled on that of the Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 801 *et seq.* S. Rep. No. 95-218, *supra*, at 58. Congress added the escrow payment provision, however, to deal with the problems it had encountered under the 1969 Mine Safety Act civil penalty program, specifically the tremendous delay and often outright failure in the collection of penalties. *Id.* at 58-59.[22]

Consideration of the operator's business interest in a potential and, in any event, insubstantial loss of the use of a small amount of money for a limited period, the governmental and public interest in an effective deterrent of unlawful and hazardous strip mining conduct, the low risk of erroneous civil penalty assessments, and the procedural safeguards provided the coal operator, compels the conclusion that the escrow requirement of § 518(c) of the Act fully comports with the procedural due process requirements of the Fifth Amendment to the Constitution. *See, Mathews* v. *Eldridge*, *supra*, 424 U.S. at 336.

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[22] Under the 1969 Mine Safety Act, operators found it to their advantage to challenge civil penalty assessments in great numbers and to delay final determinations as long as possible. The administrative burdens involved in the litigation of myriad civil penalty cases were overwhelming. In many instances, the government settled cases en masse for vastly lower fines simply to reduce the backlog. Where payment was rendered in full, it was long after the penalty had been proposed initially. Many operators, however, did not pay final assessments, leaving it up to the Attorney General to bring thousands of collection cases in the backlogged federal district courts in the coalfields, resulting in even greater delays in the collection of civil penalties. Congress determined that the long delays between the finding of a violation and the collection of a civil penalty seriously diminished the effectiveness of the civil penalty as an enforcement sanction designed to deter violations of law, and that the harm to societal interests of failing to deter such violations was significant. *See*, S. Rep. No. 95-181, 95th Cong., 1st Sess. 15-17, 40-46 (1977); S. Rep. No. 94-198, 94th Cong., 2d Sess. 23-24, 28-32 (1976).

III. SECTION 510(d), CONCERNING RECLAMATION OF PRIME FARMLAND, SECTIONS 515(d) AND (e), CONCERNING RETURN OF LAND TO APPROXIMATE ORIGINAL CONTOUR, AND SECTION 522, CONCERNING DESIGNATION OF CERTAIN LAND AS "UNSUITABLE" FOR MINING, DO NOT VIOLATE THE "TAKING CLAUSE" OF THE FIFTH AMENDMENT

Both the District Court in the Western District of Virginia and the District Court for the Southern District of Indiana declared central provisions of the Act invalid as unconstitutional "takings" without compensation. In Virginia the court invalidated §§ 515 (d) and (e), which require that mined land, including steep slope areas, be returned to its pre-mining approximate original contour ("AOC"), except in instances where certain variances are granted. 30 U.S.C. §§ 1265 (d) and (e). The court declared that the requirement to return to AOC constituted an economic and physical restriction on the taking of coal. (VSMRA J.S., App. D, 43a-57a).

The Indiana court declared unconstitutional that part of the Act which permits mining to proceed in areas of prime farmland only if it can be demonstrated that, once reclaimed, the land will be equal in productivity to its pre-mining condition. 30 U.S.C. § 1260(d). The Court found that under currently known technology, surface mined land could not be returned to previous levels of productivity (under "high levels of management"), which meant that the Act would operate as a physical restriction on surface mining on prime farmland. (Indiana J.S., App. A, 39a-47a).

Both courts also declared unconstitutional § 522 of the Act, which designates certain land as "unsuitable" for mining, and establishes an administrative procedure whereby other areas may be so designated. (VSMRA J.S., App. D, 56a-57a; Indiana J.S., App. A, 39a-42a).

The decisions of these two courts strike at the very heart of the Surface Mining Act and make the achieve-

ment of its public purpose impossible. Having determined that some areas affected by surface mining can be successfully reclaimed, whereas others cannot, Congress determined that "surface mining operations [should] not [be] conducted where reclamation as required by this Act is not feasible." 30 U.S.C. § 1202(c). No permit to mine may be issued unless the operator demonstrates its ability to reclaim the land as required by the Act. 30 U.S.C. § 1260(b)(2). In other words, Congress determined that coal production was to be directed into areas where reclamation was possible and discouraged or prohibited in areas where it was not. The decisions of the two district courts below would turn this Congressional purpose on its head by rendering the government powerless to halt mining in exactly those most sensitive environments Congress meant to protect. A decision by this Court to affirm the decisions below would destroy the Surface Mining Act of 1977.[23]

A. Neither the Virginia nor the Indiana Case Is Ripe for Adjudication

This Court need not reach the "taking" questions. It is well established that courts may not adjudge the constitutionality of statutes except in the context of actual, concrete controversies. *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 460-462 (1945). Neither the Virginia nor the Indiana case presents an actual, concrete controversy.[24]

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[23] The lower courts held only those sections related to steep slopes and prime farmland, plus the § 522 designation procedures, invalid under the Fifth Amendment. But there are numerous other provisions of the Act, which if not met, would prevent mining. *See, e.g.*, 30 U.S.C. § 1260(b) (the general requirements for a permit). These other provisions are at risk here, as well.

[24] Assuming that the two cases are ripe for review, the failure of the Appellees to actually apply for permits to mine coal limits this Court's inquiry to the question of whether the Act is valid on its face. In its last term, this Court considered a case in which property owners challenged certain municipal zoning ordinances as

In the Virginia case, the Appellees failed to identify any particular piece of property that had been taken by the relevant sections of the Surface Mining Act. No evidence was presented in that case to indicate that particular tracts of land would diminish in value as the result of the operation of the Surface Mining Act.

In the Indiana case, the Appellees did identify particular tracts of land that might be affected by the Surface Mining Act. They failed, however, to show that they had ever actually applied for and been denied permits to mine those tracts.

In neither case did the Appellees show that they had sought any administrative relief from the requirements of Section 515(d) or Section 522. These sections contain extensive variance and waiver provisions as well as administrative and judicial review procedures. *See* 30 U.S.C. §§ 1265 (c) and (e); 30 U.S.C. § 1272(e); 30 U.S.C. § 1275; and 30 U.S.C. § 1276.

B. Appellees Have not Established a "Taking" of Their Property

Assuming that there exists an actual, concrete controversy in this case, Appellees nonetheless have failed to demonstrate that there has been a taking of their property.

This Court's modern analysis of the taking issue stems from Justice Holmes opinion in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), where the Court noted that:

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a violation of the taking clause. The Court concluded that since the property owners had never actually sought approval for development of their land "* * * the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking." *Agins* v. *City of Tiburon*, 100 S.Ct. 2138, 2141 (1980). Here, Appellees' contention is that the Act's application and not its mere enactment constitutes a taking. As such, Appellees' action must be dismissed.

> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . ."

The Court has had considerable difficulty fashioning general principles for ascertaining when regulation "goes too far." *Penn Central Transportation Company* v. *City of New York*, 438 U.S. 104, 123-124 (1978). In determining whether a regulation "goes too far," this Court normally balances the private and public interests involved.[25] As explained in *Agins* v. *City of Tiburon*, *supra*, 100 S.Ct. at 2141:

> Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests. [citation omitted]

In the instant case, the public interest in prime farmlands, in the restoration of mined land to its approximate original contour, and in the designation of certain lands as "unsuitable" for mining outweighs the burden those requirements impose on private property owners.

1. *The Virginia Case: the Approximate Original Contour Provisions of the Act Are Constitutional*

The environmental benefits of requiring coal mine operators to return the land to its approximate original contour are significant. As the House of Representatives' Committee Report on the Surface Mining bill noted:

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[25] In certain past cases this Court has employed various tests which are plainly not applicable to the instant situation. This is clearly not a case involving "actual physical invasion" of property. Compare *United States* v. *Causby*, 328 U.S. 256 (1946); *Kaiser Aetna* v. *United States*, 100 S.Ct. 383, 393 (1979). Nor is it a case where all attributes of property ownership have been "extinguished." *Cf. Pruneyard Shopping Center* v. *Robins*, 100 S.Ct. 2035 (1980). Moreover, as discussed below, inasmuch as this is a case involving the broad exercise of the police power, the "diminution in value" is inapplicable here. Compare *Pennsylvania Coal* v. *Mahon*, 260 U.S. 393 (1922).

> In the humid East, retention of overburden material on the bench, avoiding all unnecessary placement of unconsolidated material on steep slopes, would contribute most significantly to the elimination of slides, sedimentation, siltation and other offsite effects which threaten downstream areas. *The basic concept embodying this principle is returning the mining site to its approximate original contour.* [Emphasis added]

H.R. Rep. No. 95-218, *supra*, at 80.

The primary rationale underlying the Virginia court's finding that the approximate original contour requirements of the Act are unconstitutional is its conclusion that a return to approximate original contour is "economically and physically impossible." (Virginia J.S. App. D., pp. 37a-38a, 44a).

This conclusion was expressly rejected by Congress after years of study and debate. H.R. Rep. No. 95-218, *supra*, at 97, 123-124; S. Rep. No. 93-402, 93rd Cong., 1st Sess. 44-45 (1973). Indeed, Congress anticipated the very arguments raised by the Appellees in the Virginia case:

> The bill's critics have alleged, to the contrary, that the term "approximate original contour" imposes an overly rigid and impractical requirement. It should be emphasized, therefore, that a reasonable interpretation of H.R. 2 cannot justify the assertion that the bill requires either the impossible task of restoration of the original contour or the useless act of digging a new pit to obtain fill material to achieve full restoration of the original topography.

H.R. Rep. 95-218, *supra*, at 96. The congressional findings that return to approximate original contour is necessary and feasible are entitled to considerable deference. As this Court repeatedly has observed:

> . . . legislative acts adjusting the burdens and benefits of economic life come to the court with a presumption of constitutionality. . . .

Usery v. *Turner Elkhorn Mining Company*, 428 U.S. 1, 15 (1976).

The evidence before the Virginia District Court concerning the reasonableness of returning land to its approximate original contour was mixed. (*Compare* Tr. 977-978, 1158, 1168-1169, 1171, 1217, 1788-1789, 1807-1808, *with* Tr. 2625, 2665, 628-629, 657-658). In the face of Congress' explicit review of the approximate original contour requirement, and with the trial evidence lying on both sides of the question, the district court should have deferred to the Congressional findings and conclusions. "[D]ebatable questions as to reasonableness are not for the courts, but for the Legislature. . . ." *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 595 (1962).

2. *The Indiana Case: The Prime Farmland Provisions Of the Act are Constitutional*

Prime farmland is one of the nation's most important resources,[26] yet it is disappearing at a dramatic rate. As the President's Council on Environmental Quality noted in its 1979 annual report:

> Prime farmlands are the most efficient, energy-conserving, environmentally stable lands available for meeting food and fiber production needs. Neverthe-

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[26] Senator Culver, in introducing the prime farmland protection provisions of the Act, called such land the nation's most valuable resource, next to its people. 123 Cong. Rec. S8104 (daily ed. May 20, 1977).

The Indiana Court concluded in its 10th Amendment analysis that Congress' concern for the protection of prime farmland was unreasonable since the United States possesses large acreages of such land, and only small areas are affected by mining. (Indiana J.S. App. A., 21a-23a). Congress obviously concluded, just to the contrary, that the nation possessed such extensive coal reserves that it could afford to limit mining on fragile land areas such as prime farmland. Surely the elected legislatures are better equipped than courts to make the often unavoidable "choice between the preservation of one class of property and that of another . . ." *Miller* v. *Schoene*, 276 U.S. 272, 279 (1928).

> less, development pressures are converting prime lands to nonagricultural uses nationally at a rate of about 1 million acres per year.

Council on Environmental Quality, *Environmental Quality —1979*, 396 (1979). Congress attempted to deal with part of the prime farmland problem in the Surface Mining Act by allowing mining to proceed in areas of prime farmland only if it could be demonstrated that, once reclaimed, the land would be equal in productivity to its premining condition. 30 U.S.C. § 1260(d). *See* H.R. Rep. No. 95-218, *supra* at 105-106.

The Indiana District Court concluded that "it is technologically impossible to reclaim prime farmland in a postmining period so that equal or higher levels of yield under high levels of management practice can be achieved." (Indiana J.S., App. A, 41a). This finding, however, is directly contradicted by considerable evidence in the record (Defendants' Ex. A, B, F, G; Tr. 85-86, 142). In light of this conflicting evidence, it was entirely inappropriate for the Indiana District Court to have overturned Congress' explicit finding that reclamation of prime farmland is technologically possible.

3. *Section 522 of the Act is Constitutional*

Both the Virginia and Indiana courts declared § 522 of the Act, 30 U.S.C. § 1272, unconstitutional as a taking wtihout compensation.[27] Those rulings have no basis whatsoever in the record and must be reversed.

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[27] Both the Virginia and Indiana Court declared § 522(e), 30 USC § 1272(e), unconstitutional. (VSMRA J.S., App. D, 56a-57a; Indiana J.S., App. A, 39a-42a) It prohibits surface mining within 100 feet of a public road or cemetery, or within 300 feet of any occupied dwelling, public building, school, church or public park. It also limits mining on certain federal lands, such as parks and wilderness areas. The court in Virginia also declared unconstitutional § 522(a), 30 USC § 1272(a), which requires that states, to gain federal approval of a surface mining program, must establish a procedure whereby areas not Congressionally designated as un-

Neither court had before it evidence from any party who had been injured in any way by the operation of § 522(e) requiring mining operations to stay a certain distance from homes, cemeteries, and public establishments. Nor was there evidence that an administrative proceeding had designated any of Appellee's land unsuitable for mining pursuant to § 522(a).

Moreover, the sort of "setback" restrictions imposed by § 522(e) were many years ago upheld as constitutional by this Court. *See Gorieb* v. *Fox*, 274 U.S. 603 (1927). Even under the lower court's interpretation of the "diminution in value" test, such restrictions do not constitute a taking since "[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central Transportation Co.* v. *New York*, *supra*, 438 U.S. at 130.

Since § 522 is constitutional on its face, the lower courts' decisions invalidating it must be reversed. *Agins* v. *Tiburon*, *supra*, 100 S.Ct. at 2141.

C. The Diminution in Value Test is Inappropriate in Cases Where, As Here, Congress is Seeking to Employ Its Police Power to Implement a Broad Public Policy

Both the Virginia and Indiana Courts based their taking findings in part upon their conclusion that the relevant sections of the Surface Mining Act would diminish the value of Appellees' property interest. However, the diminution in value test was never intended to be applied to Congressional efforts to protect the public health and safety.[28] The lower courts' decisions to the

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suitable may be administratively designated if it is shown that they cannot be reclaimed or that they possess especially significant surface land values. (VSMRA J.S., App. D, 56a-57a).

[28] Any attempt to base the law of taking on an economic test is doomed to produce very peculiar practical consequences. Since a

contrary are based on an erroneous reading of Justice Holmes' decision in *Pennsylvania Coal Co.* v. *Mahon, supra,* the case in which this Court first set down its "diminution in value" test. A careful reading of the *Pennsylvania Coal* case shows that the "diminution in value" test was intended to be applied only to governmental attempts to alter private interests and not to the exercise of the police power to protect the public health and safety.

The *Pennsylvania Coal* case involved the constitutionality of Pennsylvania's Kohler Act. The Act prohibited mining activities that would cause subsidence of any private dwelling used as a human habitation. 260 U.S. at 412-413.

The Mahons in that case owned the surface of certain land on which they had built a house. That land sat above coal interests owned by the Pennsylvania Coal Company. The Mahons had obtained title to the property several decades earlier as a result of a conveyance by the coal company in which the surface estate was severed from the mineral estate. The right to remove all coal under the tract was reserved to the Pennsylvania Coal Company, and the Mahons took the premises subject to the express waiver of all claims for damages that might arise from the mining of the coal including subsidence. Relying on the Kohler Act, the Mahons sought to enjoin mining to the extent that it might cause subsidence of their home. *Id.* at 412.

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determination of whether it is economic to mine a certain seam of coal depends in part on the price of coal, the constitutionality of regulatory requirements would fluctuate with the price of coal. A coal seam that was marginally economic to mine one month might be uneconomic to mine the next if the price of coal dropped. If the taking law were based on the economic feasibility of mining, Surface Mining regulations as they applied to that mine would be constitutional one month and unconstitutional the next. Indeed, testimony in the Virginia case indicates that coal prices fell nearly 30 percent during the first few months of the Surface Mining Act's implementation. Testimony of Richard Newcombe, Tr. at 1238.

A review of the arguments made by the Pennsylvania Coal Company in the Supreme Court clearly indicates that the heart of its argument was that the Kohler Act was an attempt to rewrite the contractual agreement between the company and the Mahons, and not an attempt to protect the public health and safety. As the Company noted in its brief to this Court:

> The Act shows on its face that its purpose is not to protect the lives or safety of the public generally, but merely to augment the property rights of a favored few.

Id. at 398.[29]

In contrast the Mahons argued that:

> [T]he protection of the life, health and safety of the public in the anthracite mining communities is the primary purpose of the Act. Its interference with property rights is merely incidental.

Id. at 405.

The majority in *Pennsylvania Coal* rejected the Mahons' contention that the Kohler Act was a legitimate exercise of the police power, and accepted instead the coal company's view. Said Justice Holmes for the Court:

> This is the case of a single private house . . . . A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public . . . . The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is

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[29] The Company urged that the Mahons and other private and public surface owners paid less for their property because they knowingly opted not to buy from the coal company the right to permanent support of the underlying coal. The Kohler Act altered this bargained for contractual relationship of the coal and surface owners. The right to mine the underlying coal was, in effect, transferred by the Act to the surface owner without compensation to the coal owner. Thus, so the argument went, the purchaser of a severed surface estate had purchased land at a reduced cost be-

> owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety.
>
> * * * *
>
> So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Id. at 413-414, 416.

Thus, while Mr. Justice Brandeis eloquently argued in the oft cited dissent that the Kohler Act was a legitimate exercise of the police power intended to protect public health and welfare, *Id.* at 416-422, it is clear that Pennsylvania Coal was viewed by the majority as a case in which the legislative power was used primarily to protect private parties rather than to enhance public interests.

The case at bar is plainly not one where, as in *Pennsylvania Coal*, the Court is being asked to protect private rights. Rather this case, involving as it does Congress' attempt to regulate a major public problem, fits squarely within that line of precedents where the Court has prohibited the harmful or "noxious" uses of property regardless of whether they produced a "diminution in value." The rule in such cases was long ago defined in *Mugler* v. *Kansas*, 123 U.S. 623, 668-669 (1887):[30]

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a

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cause coal rights were not included. The Kohler Act enabled the surface estate purchaser to obtain much more than he or she bargained and paid for. *Id.* at 416.

[30] Several years after writing *Pennsylvania Coal*, Justice Holmes joined the Court's opinion in *Miller* v. *Schoene*, 276 U.S. 272 (1928), which cites with approval *Mugler* v. *Kansas*.

taking or an appropriation of property for the public benefit.[31]

D. Plaintiffs Have Not Demonstrated A Taking Even Under the Diminution in Value Test

Assuming that the diminution in value test is appropriate in this case, Appellees have not shown that they have been victims of a government taking. Under the established precedent of this Court, a government action does not amount to a taking under the "diminution in value" test unless the owner is left with no reasonable use of his property, so that the property is made valueless. *Agins* v. *City of Tiburon, supra; Andrus* v. *Allard*, 444 U.S. 51 (1979); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.).

Under the diminution in value test the Virginia Appellees must show that their land cannot be used for other non-coal development such as timber cultivation. Both the Virginia and Indiana Appellees must demonstrate that the coal could not be extracted and used by a method that would not violate the provisions of the Surface Mining Act such as in situ combustion of the coal or underground mining. To prevail, the Appellees also must demonstrate that future technological developments will not enable them to extract coal from their property in compliance with the Surface Mining Act. Without such showings, Appellees' property continues to have market value and there can be no taking. No Appellee has made the requisite showing.

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[31] *See also, Goldblatt* v. *Town of Hempstead, supra*; *Miller* v. *Schoene*, 276 U.S. 272 (1928); *Pierce Oil Corp.* v. *City of Hope*, 248 U.S. 498 (1919); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); *Reinman* v. *City of Little Rock*, 237 U.S. 171 (1915).

CONCLUSION

For the foregoing reasons, Amici submit that the challenged provisions of the Surface Mining Act, as passed by Congress and implemented by the Secretary, are fully consistent with the requirements of the Constitution. Those provisions, moreover, are vital to the preservation of significant social and environmental values. The decisions of the district courts below should be reversed.

Respectfully submitted,

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DATED: November 20, 1980

No. 79-1538

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.,
Appellees.

On Appeal from the United States District Court Western District of Virginia

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No. 79-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.,
Appellees.

On Appeal from the United States District Court Western District of Virginia

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief in support of appellees Virginia Surface Mining and Reclamation Association and the Commonwealth of Virginia pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for all parties. Copies of these letters have been submitted to the Clerk of this Court.

PLF is a nonprofit, tax-exempt organization with offices in Sacramento, California, and Washington, D.C., existing for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens. The Board evaluates the merits of any contemplated legal action and

authorizes such legal action only where PLF's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

The government is appealing from the decision of the United States District Court of Virginia, Western District, which held, *inter alia,* that: (1) Sections 515(d) and (e) of the Surface Mining Control and Reclamation Act of 1977[1] (Act), which prescribe certain reclamation performance standards for surface coal mining operations conducted on steep slopes, violate the Tenth Amendment; and (2) Sections 515(d) and (e) and Section 522[2] of the Act take private property without just compensation in violation of the Fifth Amendment. PLF will address those issues, showing that the District Court's holdings were correct and should be upheld.

PLF's concern in this proceeding is that the federal government not interfere with constitutionally guaranteed private property rights and the traditional regulation of those property rights by the states rather than by the federal government. PLF is also interested in insuring that when the federal government does take property, it pays just compensation as required by the Constitution.

PLF contends that when a law diminishes the value of property to the point where it becomes virtually worthless, then a compensatory taking has occurred. In this case, appellees' property value is so regulated that there is no remaining reasonably beneficial use. The Act caused this drastic diminution by preventing the appellees from taking advantage of the abundant coal deposits that lie just under the surface of appellees' land. The impact extends, however, beyond the landowner to the public seeking affordable energy sources. Specifically, Sections 515(d) and (e) of the Act require appellees to restore the land to its approximate original contours after strip-mining, a task which, from an economic standpoint, makes it totally infeasible to mine the coal. In effect, the law controls surface mining by preventing businesses from engaging

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[1] 30 U.S.C. § 1265(d) and (e).

[2] 30 U.S.C. § 1272(e).

in it. PLF agrees with the District Court that the drastic decrease in appellees' land value caused by the Act constitutes a taking for which just compensation must be paid in accordance with the Fifth Amendment.

The provision requiring return to approximate original contours was drafted in disregard of plain common sense. For example, if a community determines that some of the contours resulting from surface mining serve a socially useful purpose, this law does not permit those contours to remain. Instead, they must be restored. In many Appalachian towns where leveled land is at a premium, the prohibition against keeping leveled ground in that condition creates serious problems. The District Court found that steep-slope land restored to its approximate original contour is worth between $5.00 and $75.00 per acre; whereas if it were leveled, it would be worth between $5,000 and $300,000 per acre. The government's solution to the Act's requirement that hillsides be restored (despite apparent local preferences to the contrary) is, at least, novel. The government argues that the Act does not prevent land from eventually remaining with the contours created by surface mining. In order to stay within the bounds of the law, one merely has to restore the contours of the land—thereby gaining compliance—and then bulldoze it a second time.[3] Besides creating a totally absurd result, that solution causes considerable economic waste.

Furthermore, notwithstanding the provisions of the Act, other federal regulations have surface mining in a regulatory stranglehold. The numerous regulations (*e.g.*, Clean Air Act and Water Pollution Control Act) provide ample federal control over how surface mining is conducted while still protecting the environment. The Act's provisions merely add to the regulatory morass which already makes it difficult to conduct surface coal mining operations.

This problem of regulatory overkill is especially counterproductive to the public interest where surface coal mining is

[3] Brief for the Secretary of the Interior at 35, 53.

concerned. Surface mining of domestic coal reserves, such as those located in Virginia, provides one of the best solutions to one of the gravest problems facing America—namely, its great dependence on foreign sources of energy. Yet, even though the coal produced from surface mines would provide a rapid and cheap way to decrease that dependence, Sections 515(d) and (e) and Section 522 of the Act not only stifle, but virtually shut off that method of domestic energy production.

Finally, PLF strongly supports environmental protection. PLF does not, however, believe that the goal of restoring a pristine environment should be sought without regard to the costs. Instead, PLF contends that there should be a balance between environmental protection and the economic growth required to maintain our civilized society. Requiring steep slopes to be returned to their approximate *original* contours does not strike a proper balance because it ignores several key considerations: (1) more productive use can often be made of level or gently sloping land than of steeply sloping land; (2) requiring steep slopes to be restored often ignores the wishes of local communities that require more level areas to sustain growth; (3) the arbitrary imposition of requiring that surface-mined land be returned to its approximate original contour can have environmentally degrading effects in certain circumstances; (4) requiring a return to the original contour freezes out small businesses which cannot afford the expensive restorations, thus lessening competition, the foundation of our free enterprise system; (5) prohibiting surface mining puts miners out of work; (6) limiting coal production in this manner raises the cost of coal to consumers; and (7) limiting the production of coal—a plentiful domestic energy resource—is counter-productive to the effort to decrease our dependence on foreign supplies of energy.

SUMMARY OF ARGUMENT

The first question that PLF will address is whether the Commonwealth of Virginia and its subdivisions' control over

the traditional state and local power to regulate land use has been usurped by the federal government in violation of the Tenth Amendment. Specifically, Sections 515(d) and (e) of the Act unlawfully infringe on states' rights by stripping the states of their power to regulate land use where surface mining takes place. The District Court correctly held that Congress did indeed violate Tenth Amendment limitations on federal activities by enacting Sections 515(d) and (e) of the Act. PLF urges that the Court affirm that decision.

PLF will also argue that Sections 515(d) and (e) and Section 522 of the Act have rendered the appellees' land virtually worthless, constituting a taking requiring the payment of just compensation. The Act's provisions require appellees' steep slopes to be returned to their approximate original contour after surface mining and prohibits surface mining in certain areas altogether. Compliance with these provisions, however, destroys the value of appellees' property by making it economically infeasible, and in some instances simply unlawful to mine the abundant mineral wealth.

ARGUMENT

I

THE SURFACE MINING CONTROL AND RECLAMATION ACT VIOLATES THE TENTH AMENDMENT BY USURPING THE STATES' TRADITIONAL POWER TO REGULATE LAND USE

The basic structure of government contained in the United States Constitution is that of a federal government of limited powers governing a union of states which possess the remainder of governmental power. This concept is expressed most clearly in the Tenth Amendment, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." Thus, the federal government cannot validly exercise powers other than those expressly granted to it.

It is well established that the Constitution does not grant to the federal government the police power. (The police power is the governmental power to subject individuals to reasonable regulations in order to achieve such governmental objectives as the public health, safety, and welfare. *Goldblatt v. Hempstead,* 369 U.S. 590 (1962).) Thus, Congress may not enact police power regulations to operate within the territorial limits of a state. *United States v. Dewitt,* 76 U.S. 41 (1869). The police powers are instead reserved to the states. *Keller v. United States,* 213 U.S. 138 (1909); *Sinnot v. Davenport,* 63 U.S. 227 (1859). Their legislatures delegate the police power to local governing bodies, and it is used to support various forms of state and local regulation.

Land use regulation is one of the traditional police powers exercised by the states and their political subdivisions. *Village of Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926). Indeed, it is an essential state function because it allows the states to balance environmental protection with the many types of activities upon which their economies are based. This Court has long held that each state has full jurisdiction to regulate the land within its borders, without federal interference. For example, in *Kansas v. Colorado,* 206 U.S. 46 (1906), Kansas sued Colorado for diverting the waters of the Arkansas River for the irrigation of lands in Colorado. The United States intervened, claiming a right to control the waters of the river to aid in reclamation of federally owned arid lands. It argued that it had the right to use the waters pursuant to the Reclamation Act, 43 U.S.C. §§ 37l, *et seq.* The Court, in dismissing the United States' claim, relied upon Article IV, Section 3, clause 2, of the Constitution which provides that Congress has the power to make all necessary rules and regulations regarding its property. The Court held that the provision limits Congress to exercising its power over property belonging to the United States, and does not allow for any legislative control over the property of the individual states.

This Court should reaffirm the holding of *Kansas* here and find that Congress cannot exercise legislative control over land that it does not own in individual states. In promulgating the

Act, Congress decided that the regulation of surface mining and reclamation basically belongs to the states because of the differences in "terrain, climate, biologic, chemical and other physical conditions in areas subject to mining operations." 30 U.S.C. § 1201(f). However, the states have no choice but to adopt the federal standards as their own or else hand over total control of surface coal mining to the federal government.[4] While the Clean Air Act and the Federal Water Pollution Control Act have similar requirements, an important difference is that air and water pollution are carried interstate. Land, however, is unique in that it is permanently situated within a state's boundaries. Indeed, without that characteristic, the definition of "boundaries" would be rendered meaningless. Thus, the Act, by forcing states to adopt the federal regulations as their own (if the states prefer not to engage in that charade, the federal government will simply supply its own regulations) denies the states their traditional broad discretion to legislate pursuant to the police power "so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." *Keller,* 213 U.S. at 145.

In addition to the Act being unconstitutional, its provisions disregard totally the economic realities of the land. The Act's provisions are impossible for appellees to comply with and still stay in business. For example, the Act requires that steep slopes shall be returned to their approximate original contour after surface mining. Ninety-five percent of Virginia's strippable coal is located on slopes in excess of 20 degrees. To return those slopes to their original contour is such an expensive procedure that to do so gives mine operators the choice of either operating at a loss or setting the price of the coal at a level which makes it noncompetitive. Either way the result is the same for surface mine operators—bankruptcy. Apparently Congress decided to sacrifice the livelihood of persons involved in surface coal mining and also the energy that coal would produce for America in favor of turning appellees' land into a

[4] Congress provided that each state must adopt mandatory standards as determined by the Secretary of the Interior if it wishes to continue to regulate land used for surface coal mining. 30 U.S.C. § 1253.

hill museum. Moreover, as the District Court recognized, since so much of Virginia's terrain is mountainous, a great need exists for level land to build schools, airports, industries, recreation areas, shopping centers, and for farming.

Another provision of the Act prohibits surface coal mining near roads, public buildings, schools, churches, public parks, community buildings, and cemeteries. 30 U.S.C. § 1272(e). This is a blatant example of the federal government exercising the police power to regulate land use. It is also an example of wrongful meddling by the federal government with an integral state function—namely, the right to decide how its land shall be used. This Court has firmly held that such federal involvement with functions which are integral to state governments is unconstitutional. In *National League of Cities v. Usery,* 426 U.S. 833 (1976), at issue similarly was the constitutionality of a federal statute which regulated an integral state function. Specifically, the statute was the Fair Labor Standards Act which extended minimum wage and maximum hour provisions to almost all employees of the states and their political subdivisions. This Court held that Congress may not exercise its power to regulate commerce so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. 426 U.S. at 851.

Governmental functions such as fire prevention, police protection, sanitation, public health, and parks and recreation are among those the Court considered to be integral governmental functions best left to the states. However, this Court also noted that those examples are not an exhaustive catalogue of "activities which are well within the area of traditional operations of state and local governments." *National League of Cities,* 426 U.S. at 851 n.16. PLF believes that land use regulation is rightfully one of those traditional functions belonging to the states. Certainly land use regulation has traditionally been, and still is, a basic and essential governmental function of the states and their political subdivisions. 426 U.S. at 855. Indeed, if this Court were to make a finding that land

use regulation is *not* an integral state function, it would then be difficult to conceive of a basis upon which any other functions would still be reserved to the states.

II

THE SURFACE MINING CONTROL AND RECLAMATION ACT REDUCES THE VALUE OF APPELLEES' LAND SO SUBSTANTIALLY AS TO CONSTITUTE A TAKING OF PRIVATE PROPERTY, REQUIRING THE PAYMENT OF JUST COMPENSATION

A. Protection of Personal Rights In Property Against Government Intrusion Is a Fundamental Precept of the Federal Constitution

American political scientists and legal scholars have pointed to protection of personal rights in property as the fundamental motivation for adopting the Constitution.[5] The express constitutional restrictions on governmental interference with private property have been augmented by judicial doctrine.[6] This Court has stated unambiguously that the Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation (applicable to the states through the Fourteenth Amendment) operates as a limitation on the exercise of the police power. *Goldblatt,* 369 U.S. 590; *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).

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[5] *See* B. Siegan, *Economic Liberties and the Constitution* at chs. 2-4 (1980).

[6] For example, nineteenth century jurists broadly construed the Contract clause of the United States Constitution, Article I, Section 10, as a means of protecting vested property rights against unjust government interference. *E.g., Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat) 518 (1819).

B. The General Law Regarding Eminent Domain and the Police Power Demonstrate that the Surface Mining Control and Reclamation Act's Land Use Provisions Constitute a Taking

Even assuming, *arguendo,* that the Act does not usurp the states' traditional police power over regulation of land use, this Court should still affirm the District Court's holding that the Act so diminishes the economic value of appellees' land as to amount to a taking of property without compensation in violation of the Fifth Amendment to the United States Constitution. The Fifth Amendment forbids federal actions which abridge property rights, stating that:

> "[N]o person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

It is well settled by this Court that under the Fifth Amendment, property owners have a personal right to the use and enjoyment of their property without unlawful deprivation. Thus, the Court held:

> "[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552 (1972).

This includes the right to possess, use, and dispose of property. *United States v. General Motors Corp.,* 323 U.S. 373, 377-78 (1945).

Governmental restrictions on the unfettered use of one's property have occurred traditionally in either one of two generally recognized ways. The first is through the power of eminent domain, in which private property is taken by the government to further a public purpose. When such takings occur, the landowner is constitutionally entitled to just compensation, and title passes to the government. *See Boston Chamber of Commerce v. Boston,* 217 U.S. 189, 195 (1910).

The second method by which the government restricts private land use is through the exercise of the police power.[7] This method arose initially out of attempts by the government to curb noxious activities by the landowner that constituted a nuisance. *See Hadacheck v. Sebastian,* 239 U.S. 394 (1915). However the police power has been expanded to include regulation of other than noxious uses. *See, e.g., Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) (upholding zoning ordinance which limited the occupancy of one-family dwellings to traditional families or to groups of not more than two unrelated persons). However, constitutional limits on the exercise of the police power do exist: such power cannot be exercised in a manner which imposes either arbitrary, discriminatory, or otherwise unreasonable restrictions on the use of one's private property. Nor can it impose restrictions which eliminate the possibility of making any reasonably beneficial use of the property.

The instant case presents the issue of whether a federal statute which so regulates appellees' land as to render it valueless constitutes an unlawful taking of appellees' property in violation of the Fifth Amendment. In an inverse condemnation case squarely on point, *Pennsylvania Coal Co.,* 260 U.S. 393, this Court held that a restriction on the right to mine coal amounted to a taking of private property requiring the payment of just compensation. The Court acknowledged that the state was exercising its police power in order to promote public safety when it prohibited the extraction of coal in a way that caused subsidence of the surface. However, the Court held that the regulation was too restrictive to be upheld, pointing out that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the Constitutional way of paying for the change." *Pennsylvania*

[7] For a discussion of the distinction between eminent domain and the police power, *see* Sackman, *The Impact of Zoning and Eminent Domain Upon Each Other,* 1971 Institute on Planning, Zoning and Eminent Domain 107, 110-111.

Coal Co., 260 U.S. at 416. Likewise, this case is before the Court for a determination that restrictions on mining are excessive, even though they were enacted to promote public safety.

Sections 515(d) and (e) require reclamation of surface mined lands, but those provisions do so in a manner which prevents Virginia surface miners from mining because the costs of reclaiming lands in accordance with the Act are prohibitive. Section 522 goes a step further by denying the landowners the right to decide whether or not to mine their land. It specifically prohibits (rather than regulates) surface mining on certain specified lands. Thus, this case, so analogous to the facts in *Pennsylvania Coal Co.*, deserves the same outcome—namely, invalidation of the unconstitutional provisions until such time as just compensation is paid.

Moreover, this Court has held that the right to mine coal is valuable because it can be exercised for profit. Thus, "to make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating it or destroying it." *Pennsylvania Coal Co.*, 260 U.S. at 414. The District Court found, after a 13-day trial, that the Act makes it commercially impracticable to surface mine coal in Virginia. This Court should accept the District Court's findings and apply the holding in *Pennsylvania Coal Co.* to this case to find that Sections 515(d) and (e) and Section 522 of the Act constitute a taking.

This Court has stated that it is proceeding on a case by case basis in inverse condemnation cases to determine when a compensable taking has occurred. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In *Penn Central Transportation Co.*, Penn Central was prohibited from developing the air space above the Grand Central Terminal pursuant to New York City's Landmarks Preservation Law. The Court, in holding that there was not a taking, stated that Penn Central had not been denied all reasonable use of the property.

By contrast, appellees are deprived of virtually all reasonable use of their property. The only reasonable use for appellees' land is to remove and utilize the mineral wealth by

surface mining it. However, surface mining triggers the reclamation provisions of the Act which make it economic suicide to proceed. Furthermore, the Act prohibits all surface mining in certain specified areas. Thus, appellees cannot settle simply for less profit as the plaintiff in *Penn Central Transportation Co.* did. (Penn Central still maintained a profit from Grand Central Terminal.) Instead, appellees' land, so rich in mineral wealth, is virtually valueless since the coal is marketable only when removed from the ground.

Furthermore, in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), this Court recently expanded its dicta from *Penn Central Transportation Co.* that a state statute which substantially furthers public policies may so frustrate distinct investment-backed expectations as to amount to a "taking." In *Kaiser Aetna,* a private developer in Hawaii converted an inland pond contiguous to a navigable bay into a marina by dredge and fill operations that connected the pond to the bay. The United States Army Corps of Engineers (Corps) allowed the construction of the marina without requiring a permit. Later, the Corps contended that the developer was precluded from denying the public access to the pond because, as a result of the improvements, the pond had become a navigable water of the United States. This Court held that the former pond constituted navigable water subject to federal regulatory authority. However, the Court concluded that the Fifth Amendment's Taking Clause precluded the federal government from creating a public right of access to the pond, without compensating the owner.

In examining the "taking" question, the Court identified several factors of particular significance—the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. By applying those factors to appellees' situation, it is clear that their investment-backed expectations are thoroughly dashed by the Act's provisions and therefore a taking has occurred. Due to the Act's reclamation provisions and total prohibitions from mining in certain areas, appellees are unable to mine coal profitably, if at all. The severe economic impact of

the Act upon mine operators was shown unquestionably during the District Court trial. Indeed, the Act is so restrictive that it goes beyond the legitimate exercise of the police power to regulate for the public health, safety, and welfare. Thus, it requires that just compensation be paid to appellees or that the Act be invalidated. As the Court has previously announced, the Just Compensation Clause of the Fifth Amendment is intended to

> "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

CONCLUSION

PLF respectfully submits that the District Court properly found that: (1) Sections 515(d) and (e) of the Surface Mining Control and Reclamation Act violate the Tenth Amendment to the Constitution by depriving the states of their traditional power to regulate their land, and thus their economy; and (2) Sections 515(d) and (e) and Section 522 of the Act diminish the economic value of appellees' coal bearing land so drastically as to amount to a taking of property without just compensation in violation of the Fifth Amendment to the Constitution. Thus, the District Court's ruling that those sections are invalid should be upheld. Such a ruling would allow a sharp increase in America's use of domestic sources of energy and, in turn, decrease our reliance on foreign supplies which are subject to interruption, cutoff, and rapidly spiraling prices. Increasing our energy self-sufficiency will benefit all segments of American society; it will help our balance of payments, lessen inflationary pressures, decrease the rate of unemployment, and make our country more secure strategically.

Respectfully submitted,

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December, 1980

No. 79-1538

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CECIL D. ANDRUS, Secretary of the Interior, - Appellant

versus

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., Et Al., - Appellees

On Appeal from the United States District Court
for the Western District of Virginia

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES' POSITION BY PIKE COUNTY, KENTUCKY

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QUESTION PRESENTED

Whether the provisions of the Surface Mining Control and Reclamation Act of 1977, Section 515(b) and (d), 30 U.S.C. §1265(b) and (d) (1979), requiring mined land to be restored to its approximate original contour with all highwalls eliminated is violative of the tenth amendment to the United States Constitution.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1538

CECIL D. ANDRUS, Secretary of the Interior, - *Appellant*

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., - - - *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES' POSITION BY PIKE COUNTY, KENTUCKY

INTEREST OF AMICUS CURIAE

Pike County is a political subdivision of the State of Kentucky. The City of Pikeville is the county seat and major urban center.

The County and the incorporated municipalities provide their citizens roads, streets and bridges, public sewer and water services through municipal agencies and public water districts, refuse collection and disposal, police and fire protection, parks and recreational facilities.

Planning and zoning authority for all areas of the county is exercised by the Pikeville-Elkhorn City-Pike

County Planning Commission. Zoning is enforced in all areas of the county. Subdivision regulations are enforced inside the City of Pikeville and five miles beyond the city limits. Municipal building and housing codes are enforced in the incorporated areas of the county. Ninety-four units of public housing are provided by Pikeville and the County.

The 1977-78 budget for Pike County was $1.2 million, exclusive of federal revenue sharing funds, which came from local property tax levies and turned back portions of the State severance tax from coal mined in the county.

Pike County occupies the easternmost tip of the State of Kentucky and lies wholly within the Appalachian coal fields. Entirely mountainous in topography, over 75% of the county's surface is mountain slope and the remainder lies in the floodplain areas of the Big Sandy River and its tributaries. The County, in 1977-78, was Kentucky's largest coal producing county. The County produced nearly 20 million tons in 1978-79 worth more than $500 million on which nearly $26 million in severance taxes were paid.

Pike County's economy, employment base and tax revenues are solely dependent upon coal mining. The type, quality and level of public services are thus directly dependent on coal mining. County land use policies traditionally reflect the needs of its coal economy and depend upon the local coal industry for excavation, cut and fill, stream chanelization and much rural road construction. Being adversely impacted by the direct and indirect efforts of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, 30 U.S.C. §§1201 *et seq.* [hereinafter "the Act"], the County wishes its views on the constitutionality of the Act under the tenth amendment to be advanced in support of Appellees.

SUMMARY OF ARGUMENT

The Approximate Original Contour Requirement of the Act Is Unconstitutional Under the *Usery* Rule as Applied

The tenth amendment establishes a constitutional immunity for the states against the federal government and thus reflects the dual sovereignty structure of our Constitution. This immunity prevails over commerce clause legislation to the extent the latter would invade a state's freedom to structure integral operations regarding their traditional governmental functions. *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). Thus Congress has no power under the commerce clause to force, displace or penalize states or their political subdivisions regarding their important traditional affairs, whether or not the subject matter is in interstate commerce. This case presents the question of whether the Act as applied in Appalachian counties does have such a displacing effect.

A. The Act Forces the State and County to Reverse Their Land Use Policies Because of the Approximate Original Contour Requirement or Have Their Policies Preempted

Federal categorical regulatory programs which are backed up by the threat of federal preemption—unlike categorical assistance programs—are inherently "coercive." The fact that the Act does not directly command state officials to do or not to do anything does not ameliorate its inherent coercion where the threat is to preempt state control over its lands. Kentucky delegates to its counties control over land uses within their boundaries and would not require, but for the Act, that mined land be restored to its

approximate original contour [hereinafter "AOC"] in deference to the counties' authority, needs and desires for flat, developable land. The 1980 Kentucky General Assembly was coerced by the Act to adopt post-effective statutes changing its land use policy.

B. The Approximate Original Contour Requirement Directly Displaces State Land Use Policy

There is a direct conflict between the state and federal land use policies regarding AOC, a conflict which Congress intended and wrote into the Act in the form of Sections 515(b)(3) and 515(c), (d) and (e), 30 U.S.C. §1265(b)(3), (c), (d) and (e) (1979). These AOC provisions, with their inflexible requirement that all highwalls be covered in all postmining circumstances, as applied in Appalachia, permit no meaningful variances from AOC even for valid alternative postmining land use purposes. Further, the Secretary of the Interior [hereinafter "the Secretary"] has interpreted the Act and taken enforcement actions indicating that meaningful variances will not be available under the permanent program.

C. The Approximate Original Contour Requirement Adversely Affects Pike County's Integral Operations Regarding Governmental Functions

The intended and applied effect of the AOC provisions directly affects Pike County's land use control authority and indirectly affects its governmental structure and operations regarding public services and facilities, housing and private commercial development, revenues, and its long-range economic development plans and prospects. Pike County's traditional reliance on private coal industry ex-

cavation activities to create level, developable land for itself and private surface owners has been and will continue to be defeated completely by the AOC requirement of the Act as applied in Appalachia.

ARGUMENT

The Approximate Original Contour Requirement of the Act Is Unconstitutional Under the *Usery* Rule as Applied

"The Tenth Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry* v. *United States,* 421 U. S. 542, 547 n. 7 (1975). The tenth amendment expresses the dual sovereignty structure of governmental authority embodied in our Constitution and carves out an area of state immunity from Article I exercises of power by Congress:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that matter. *National League of Cities* v. *Usery,* 426 U. S. 833, 845 (1976).

Modern constitutional doctrine marking the boundary between tenth amendment immunity and the commerce clause was formulated by this Court in *Usery.* The Court stated, "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental

functions, they are not within the authority granted Congress by Art. I, §8, cl. 3." *Id.* at 852. Following *Usery* it is clear that the central issue in cases presenting clashes between state immunity under the tenth amendment and Congress' powers under the commerce clause is whether the congressional legislation as applied displaces state "functions essential to separate and independent existence." *Id.* at 845.

The criteria employed in *Usery* to determine the constitutional effect of challenged wage and hour provisions of the Fair Labor Standards Act when applied to the states and their political subdivisions were: 1) the increased operating costs imposed on states, cities and counties leading to "forced relinquishment of important governmental activties" *Id.* at 847, 2) displacement of state policies regarding integral governmental operations, relating to traditional local governmental functions such "as fire prevention, police protection, sanitation, public health, and parks and recreation" *Id.* at 851;[1] and 3) direct or indirect penalization of States for structuring the conduct of their traditional affairs in a manner at variance with Congress' policy choices.

This tenth amendment immunity extends to the integral governmental functions of the states' political subdivisions, placing them also "beyond the reach of congressional power under the Commerce Clause" just as if these operations were performed by the state itself. *Id.* at 855 n. 50.

The *Usery* case stands on far broader constitutional ground than the Secretary would allow. The *Usery* rule is

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[1]This list of traditional governmental functions are examples only and "not an exhaustive catalogue of the numerous line and

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that admittedly valid commerce clause legislation, even when accompanied by formal necessary and proper clause findings, cannot be applied to displace, directly or indirectly, in any substantial matter the free exercise of state powers relating to "functions essential to separate and independent existence." *Id.* at 845. This aspect of intergovernmental immunity complements the states' absolute immunity from suit prohibited by the eleventh amendment; their immunity from direct federal taxes, *New York* v. *United States,* 326 U. S. 572 (1946); and the absolute rights conferred by Article IV §3 of the United States Constitution. It reflects the federalism considerations underlying their executive branch immunity from the Sherman Act prohibitions under *Parker* v. *Brown,* 317 U. S. 341 (1943); the protection of their judical proceedings from undue interference by the federal judiciary, *Younger* v. *Harris,* 401 U. S. 37 (1971), and respect for the economic regulatory legislative enactments. *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963). When commerce clause legislation clashes with tenth amendment immunities any substantial invasion by Congress of states' traditional governmental functions raises a presumption of unconstitutionality which can be overcome only by the highest national considerations.

The Secretary attempts to avoid the thrust of the tenth amendment claim here by first asserting that the Act does

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support activities . . . of state and local governments" which may be similarly protected. *Usery* at 851n.16. The case-by-case process of inclusion and exclusion has begun. Municipal operation of an airport is protected, *Amersbach* v. *City of Cleveland,* 598 F. 2d 1033 (6th Cir. 1979); operation of state oil and gas business is not. *Public Service Co. of North Carolina* v. *Federal Energy Regulatory Commission,* 587 F. 2d 716 (5th Cir. 1979).

not "coerce" the states at all because its commands concerning AOC are directed to private citizens and not state officials, and then by contending that the provisions of AOC are not directed at the states' land use powers and only incidentally affect them. He rests his case primarily on Congress' power under the commerce clause. That reliance is misplaced.[2]

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[2]Well-settled precedent and conventional analysis establishing the reach of Congress' powers under the commerce clause over private commercial conduct do not control this case. The issue here is not whether in exercise of its commerce clause powers Congress can impose such reclamation requirements on privately conducted surface coal mining operations as it deems "necessary and proper" to regulate interstate commerce or protect the environment, and thus castle this judgment behind the supremacy clause, but whether in so doing it directly or indirectly displaces state policy choices in the constitutionally protected areas or the state's traditional governmental functions, *viz,* local control over long-term land uses. Consequently, formal necessary and proper clause "findings" by Congress that the AOC requirement "affects commerce" or is in a "class of activities" affecting commerce, or a stated congressional "purpose" to "direct" surface coal mining operations into areas where "reclamation is feasible" and away from areas where it is not, and the fact—if it be one—that the AOC requirement is thus the "heart of the Act", are neither controlling nor even particularly relevant. To the contrary, the tenth amendment immunity issue must be first resolved before the conventional commerce clause-supremacy clause issues can arise at all. Constitutional principles applicable to the scope of Congress' power to regulate commerce do not decide and bear only peripherally on the scope of the tenth amendment immunity. Congress could not bind this court directly by "finding" or "declaring" that AOC or its inflexible "highwall" requirements do not infringe on tenth amendment reserved powers, nor can it do so indirectly by "finding" that uncovered highwalls "affect commerce" and thus (impliedly) do not infringe upon the tenth amendment powers. The constitutional test of the validity of the impact of Congressional commerce clause legislation which impacts the tenth amendment

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A. The Act Forces the State and County to Reverse Their Land Use Policies Because of the Approximate Original Contour Requirement or Have Their Policies Preempted

Appellants seek to distinguish this case from the *Usery* rule by asserting that the Act does not coerce the states because its provisions are directed not to "States qua States," but only to the actions of private citizens. That cosmetic feature of the Act does not take the Act out from under the *Usery* rule nor the broader constitutional principes on which *Usery* rests. Commerce clause regulatory legislation backed by the threat of federal preemption of traditional areas of state control—the categorical regulatory program—stands on altogether different constitutional footings than the taxing and spending clause categorical assistance programs.

If "coercion" is required in these "categorical regulatory" programs at all, the Act is clearly coercive. More accurately, all federal categorical regulatory programs are inherently coercive because they rest on the threat of federal preemption.[8]

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immunities is not only that the legislation must have a "rational basis" under the necessary and proper clause but the legislation must also survive the more stringent arbitrariness principle of the fifth amendment. *Usery* at 841. Resolution of the tenth amendment issue in this case is controlled by the constitutional principles, criteria and reasoning of *McCulloch* v. *Maryland,* 17 U. S. (4 Wheat.) 316 (1819); *National Association of Cities* v. *Usery,* 426 U. S. 833 (1976); *New York* v. *United States,* 326 U. S. 572 (1946); *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514 (1926); and *Lane County* v. *Oregon,* 74 U. S. (7 Wall.) 71 (1869); and not by those of *Gibbons* v. *Ogden,* 22 U. S. (9 Wheat.) 1 (1824); *United States* v. *Darby,* 312 U. S. 100 (1941); *Wickard* v. *Filburn,* 317 U. S. 111 (1942); *Heart of Atlanta Motel* v. *United States,* 379 U. S. 241 (1964); and *Perez* v. *United States,* 402 U. S. 146 (1971).

The applicable principles here do not rest on the mere fortuity that in *Usery* the challenged FLSA amendments were coercive because expressly directed at state and local governmental officials as employers implementing state policy choices regarding public employees' wage levels and hours of work. This Court made clear that the constitutional vice in *Usery* was not the direct federal commands to state officials, and not merely the monetary costs imposed on the states directly by those commands, but was instead the consequent "forced relinquishment" of state prerogatives. If the *form* of the invasion is determinative, Congress can easily and deftly avoid all tenth amendment limitations by the simple expedient of refraining from ordering

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[3]Congress may confer on federal citizens whatever monetary benefits it chooses pursuant to its Article I §8 clause I power to tax and spend for the "general welfare" and may enlist the states without coercion to act as its agent in distributing the federal largesse through voluntarily enacted state categorical assistance programs without preempting or invading the tenth amendment powers of the state. *Steward Machine Co.* v. *Davis,* 301 U. S. 548 (1937); *Massachusetts* v. *Mellon,* 262 U. S. 447 (1923). Categorical regulatory programs, on the other hand, rest on Congress' power to regulate the conduct of federal citizens directly through exercise of some affirmative grant in the constitution, coupled with the preemptive effect given its legislation by the supremacy clause. U.S. Const. art. VI. If voluntary participation by the states is a constitutional factor at all in categorical regulatory schemes, then the integral threat of federal preemption which must underlie these programs provides the necessary "coercion". It is clear that both a state regulatory program under Section 503, 30 U.S.C. § 1253 (1979) of the Act or a federal program under Section 504, 30 U.S.C. §1254 (1979), must enforce Section 515(b)(3) and Sections 515(c), (d) and (e), 30 U.S.C. §1265(b)(3), (c), (d) and (e) (1979), exactly as written, and unless the state program does so the subject will be preempted. §505, 30 U.S.C. 1255 (1979). This presents no "choice" at all. It is clear the State of Kentucky felt it was "coerced" by the Act. See p. 12, *infra.*

state and local officials directly to do or not to do something. This contention—the heart of the Secretary's position on this issue—was obviously rejected by this Court in *Usery*. Mr. Justice Stevens' dissent in *Usery* recites many existing examples of when federal law directly prohibits state and local officials from taking particular actions without transgressing the tenth amendment issues. *Usery* at 880. These instances of direct federal commands to state officials qua state officials are not automatically invalidated by the *Usery* rule, but the reason is not because they are not coercive but instead because they may or may not adversely affect integral governmental operations in performance of traditional state functions. *Marshal* v. *City of Sheboygan*, 577 F. 2d 1 (7th Cir. 1978).

Kentucky's strip mining law prior to the Act contained most of the elements reflected in the federal law, and, allowing for relative differences in stringency, regulated strip mining operations by substantially the same requirements as appear in Title V of the Act. Thus Kentucky regulated the method of mining operations: drainage control and the disposal of spoil, KRS 350.090 (1977); required backfilling, regrading, and revegetation, KRS 350.095-.117 (1977); and employed a permit application process, KRS 350.060 (1977); required reclamation bond, KRS 350.060 (1977); and provided administrative inspection and citation procedures to enforce these requirements, KRS 350.050 (1977).

State policy regarding the AOC requirement of the Act, however, is exactly contrary to federal policy. The Kentucky General Assembly in 1978 and 1980 amended the Kentucky statute to make it sufficiently consistent with the Act to meet the requirements of Section 503, 30 U.S.C. §1253 (1979), in order to seek "primacy" under the Act. In so

legislating, however, the 1980 Kentucky General Assembly knew it was being coerced:

> The Commonwealth of Kentucky objects particularly to the mandatory and inflexible requirement that all surface mined land must be returned to its approximate original contour with all highwalls completely covered in all circumstances . . . and if not coerced by the threatened denial of primacy by the federal office of surface mining, the State would choose to address these matters by measures of its own devising. Kentucky Acts 1980, ch. 62, preamble.

and expressly reserved the option to challenge the requirement in court.

B. The Approximate Original Contour Requirement Directly Displaces State Land Use Policy

There is a direct and necessary conflict between the express land use provisions of the Act and the land use policies of Kentucky regarding the environmental protection performance standards of both the *interim* [Section 503, 30 U.S.C. §1253 (1979)] and *permanent* [Section 504, 30 U.S.C. §1254 (1979)] programs that all highwalls created on surface mined lands be covered and the land returned to AOC. No exceptions to AOC are permitted by the Act.[4]

Section 515(b)(3), 30 U.S.C. §1265(b)(3) (1979), requires *all* surface coal mining operations "as a minimum to compact . . . and grade in order to restore the approxi-

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[4]This aspect of explicit and direct land use control in the Act distinguishes it from other federal environmental protection categorical regulatory schemes. Clearly, the obvious interstate impact dimensions to air and water pollution provide an adequate basis for comprehesive commerce clause legislation. In contrast with

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mate original contour of the land *with all highwalls, . . . eliminated*". (Emphasis added.)[5]

This AOC concept of the Act embodies two distinct and separate requirements:

1) the "configuration" requirement that the mined area must be backfilled and graded so that it "closely resembles" the pre-mining configuration of the land;
2) the "highwall" requirement that "all highwalls [must be] eliminated."[6]

Congress deliberately chose this direct displacement, there was nothing "incidental" about it. H.R. Rep. No. 95-493, 95th Cong., 1st Sess. 106 (1977).

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the Act, however, the Clean Air Act, 42 U.S.C. §1857 *et seq.*, exhaustively regulating emissions of air contaminants, contains no direct federal land use requirements or prohibitions; and the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*, contains no direct federal land use provisions. Even the federal Coastal Zone Management Act, 16 U.S.C. §1452 *et seq.*, provides that federally permitted activities effecting land use in the coastal zone must comply with the State approved plan 16 U.S.C. §1456 (3)(a).

[5]The definition of "approximate original contour" (AOC) in Section 701 (2), 30 U.S.C. §1291(2) (1979), is: "that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, *with all highwalls and spoil piles eliminated. . . .*" (Emphasis added.)

[6]The term "highwalls" is not defined in the Act. The Secretary's regulations define the word as "the face of exposed overburden and coal in an open cut of a surface coal mining activity or for entry to underground mining activities." 30 CFR §701.5 (1979).

The Secretary asserts by way of justification for AOC that because there are such statutory variances available the Act provides "flexibility" and thereby avoids unfairness or arbitrariness. These general assertions are misleading because they are essentially inaccurate. Upon examination in light of the facts and the Secretary's regulations, statutory variances dwindle to nonexistence in the mountainous counties of Appalachia.

A variance from the "configuration" requirement is provided by Section 515(c), 30 U.S.C. §1265(c) (1979), for mountaintop removal mining operations, and by Sections 515(d) and (e), 30 U.S.C. §1265(d) and (e) (1979), for contour mining operations on "steep slopes".[7] These variances theoretically permit the mined land to be left flat or gently rolling for approved postmining land uses.

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[7]Steep slopes are defined by the Act as those "above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate or other characteristics of a region or state". §515(d)(4), 30 U.S.C. §1265(d)(4) (1979).

This distinction between steep and non-steep slopes for purposes of authorizing a variance from the configuration aspect of the AOC requirement is irrational if the requirement is intended as an environmental protection measure. There would seem to be more need and less danger to public health, safety and the environment from landslides, sedimentation and erosion—and thus ample justification—for a variance from AOC for non-steep slopes where such occurrences would be rare, and just the contrary for steep slopes. As if acknowledging this anomally the Secretary's regulations define "steep slopes" in the statutory language, 30 CFR §701.5 (1979), (or such lesser slope . . . region or state) and his official comments coyly intimate that the qualifying phrase permits the regulatory authority to classify slopes *less* than twenty degrees as "steep" for purposes of broadening the Section 515(d) and (e), 30 U.S.C. §1265(d) and (e) (1979), variance. 44 Fed. Reg. 15084 (1979).

In reality, however, there is no meaningful variance from the "configuration" requirement for contour mining on the steep slopes in Pike County despite theoretical availability in the Act because of the absolute "highwall elimination" requirement.

There are *no* statutory variances from the "highwall" requirement. No highwalls remain in mountaintop removal operations, Section 515(c)(2), 30 U.S.C. §1265(c)(2) (1979), 30 CFR §785.14(b) (1979); but highwalls must be eliminated in all contour mining operations on steep slopes, Section 515 (d)(2) and (e)(1), 30 U.S.C. §1265(d)(2) and (e)(1) (1979); 30 CFR §785.16 (1979). The Secretary takes the position that:

> The intention of the Act was not to provide loopholes by which operations might be conducted without eliminating the highwall. The variance provision permits the operator to regrade the (sic) effected area to a steeper angle than the original topography; however, the stability of the backfilled material must be assured and the highwall must be eliminated by backfilling or reduction. OSM believes that the drafters of Section 515(e)(2) meant what they wrote, when they provided that the variance would be from "approximate original contour," and not from the highwall covering requirement, which is a separate requirement of Section 515(d)(2) of the Act. 44 Fed. Reg. 15084 (1979).

See also 30 CFR §826.15 (1979) and the Secretary's official comment thereto at 44 Fed. Reg. 15291 (1979).

The "highwall" requirement of AOC effectively forecloses in Pike County, Kentucky, all possible application of the Section 515(d) and (e), 30 U.S.C. §1265(d) and (e) (1979), variances for alternative postmining land uses. The geophysical facts foreclose configuration variances if

highwalls must be covered in all instances. The angle of repose for spoil material in Pike County (which are predominantly sandstone and shale composition) even when mechanically compacted, is both physically and legally a fifty-percent slope [1v:2h (50 percent) plus a minimum static safety factor of not more than 1.3]. 30 CFR §816.102 (b) (1979) and 30 CFR §816.104(b)(2) (1979) (thin overburden); 30 CFR §826.12(b) (1979) (performance standards for steep slopes); 30 CFR §826.15(a) (1979) (limited variances for contour mining of steep slopes); and 30 CFR §817.102(a)(2) (1979) (underground mining). A normal height highwall in Pike County (40 to 90 feet) covered by a fifty-percent slope backfill will effectively cover 50 to 80 percent of the surface of a normal width contour mining bench in Pike County (60 to 120 feet wide) thereby reducing the potential flat land remaining for postmining land use purposes to a narrow (15 to 30 feet wide) curving, strip extending around a mountain contour for 1500 to 5000 linear feet. A theoretical statutory variance from the "configuration" aspect of AOC is, practically speaking, unavailable in Pike County, Kentucky, in light of the *de facto* "configuration" effect of the "highwall elimination" requirement, from which there is no variance possible.

All surface coal mining in Pike County is done on steep, rough, undeveloped mountain land, some previously mined, not suitable in its original configuration for any public or economic use other than mining, or perhaps, forestry. Left flat after mining it is suitable for agricultural uses in remote areas, and for public or economic uses when located near urbanized areas.[8]

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[8]The only authorized postmining land uses for which "configuration" variances may be granted are "industrial, commercial,

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Variances from the configuration requirement of AOC in contour mining operations on steep slopes cannot be granted unless "the watershed control of the area is improved" Section 515(e)(1) and (e)(3)(C), 30 U.S.C. §1265(e)(1) and (e)(3)(C) (1979). The administrative interpretation of this requirement is that the postmining land use must affirmatively reduce total suspended solids and reduce flood hazards within the watershed by reducing total flow as compared to the pre-mining hydrologic situation. 30 CFR §785.16(c)(4) (1979).

Variances in mountaintop removal operations must be predicated upon authorized postmining land use plans and

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agricultural, residential or public facility (including recreational facilities)" for mountaintop removal operations, Section 515(c)(2), 30 U.S.C. §1265(c)(2) (1979); and for "industrial, commercial, residential or public facilities (including recreational facilities)" for contour mining operations on steep slopes under Section 515(d)(2), 30 U.S.C. §1265(d)(2) (1979). There is no explanation or justification given in the Act or its legislative history for expressly authorizing a variance for an agricultural postmining land use in mountaintop removal mining operations but not in contour mining operations on steep slopes. The postmining land use potential is the same in both mining circumstances, and the language, structure and requirements of Sections 515(c), (d) and (e), 30 U.S.C. §1265(c), (d) and (e) (1979), are so similar as to suggest that the omission of "agricultural" from the list of authorized land uses of Section 515(e)(3), 30 U.S.C. §1265(e)(3) (1979), is either the result of a typographical error or Congressional inadvertence. Whether deliberate or otherwise, the distinction is irrational. In Pike County the omission is crucial because contour mining on steep slopes is virtually the only feasible method available, and agriculture is the most feasible alternative post-mining land use. The Secretary has nevertheless rigorously sutured the distinction into his regulations. Compare 30 CFR §785.14(c)(1) (1979) (mountaintop removal), with 30 CFR §785.16(c)(1) (1979) (contour mining on steep slopes), and 30 CFR §816.133 (1979) (postmining land uses).

"appropriate assurances" regarding, *inter alia*, "compatibility with adjacent land uses", "expected need and market", "investment in necessary public facilities", private financial capability for completion and supporting commitments from public agencies. Section 515(c)(3)(B), 30 U.S.C. §1265(c)(3)(B) (1979). No such statutory requirements (regarding "appropriate assurances" for compatibility, economic feasibility, financial commitments, etc.) are expressed in the Act for variances to support postmining land uses in contour mining operations.

The relatively small size of normal contour mining permit areas in Pike County, together with the fact that outcrop coal deposits suitable for extraction by "steep slope" mining methods are situated throughout the county miles from any source of water, sewer or other "public facilities", dictates that Section 515(d) and (e), 30 U.S.C. §1265(d) and (e) (1979), variances for "industrial, commercial, residential or public use (including recreational facilities)" postmining land uses are not available in Pike County. The Secretary's savage restriction by administrative interpretation of already narrow statutory variances belies his assertions here that variances soften the impact of the AOC requirement.[9]

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[9]Section 711, 30 U.S.C. §1301 (1979), empowers the Secretary to "authorize departures in individual cases on an experimental basis from the environmental protection performance standards" of Section 515, 30 U.S.C. §1265 (1979), and 516, 30 U.S.C. §1266 (1979), "in order to allow . . . post-mining land use for industrial, commercial, residential, or public use (including recreation facilities. . . ." These narrow "experimental practices" exemptions must provide environmental protection to the land equal to the normal requirements, must not be larger or more numerous than necessary to determine "the effectiveness or economic feasibility" of the experimental practice, and must meet

(Footnote continued on next page)

The Secretary's enforcement actions under the interim program indicate clearly the effect of his permanent program regulations regarding the Section 515(b)(3), 30 U.S.C. §1265(b)(3) (1979), highwall requirement in Sections 515(d) and (e), 30 U.S.C. §1265(d) and (e) (1979), variance situations. In *Tollage Creek Elkhorn Mining Co.*, IBSMA 80-32, 2 IBSMA 341, United States Department of the Interior, Office of Hearings and Appeals (Nov. 24, 1980), the Interior Board of Surface Mining Appeals held that the Act and regulations compelled it to uphold an OSM notice of violation issued to Tollage Creek Elkhorn Mining Co. for failure to cover highwalls left uncovered as portions of an access road to a proposed commercial tree farm in Pike County for which Tollage Creek had been formally granted a postmining land use variance by the

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the minimum standards of the Act for public health and safety. The legislative history makes abundantly clear that Congress intended the "experimental practices" exemption to be available for departures from the AOC requirement for postmining land uses. While the Secretary has granted a few Section 711, 30 U.S.C. §1301 (1979), exemptions from some of the prescribed mining performance standards, he has not granted any "experimental practices" reclamation exemptions for departures from the "highwall" aspect of the AOC requirement.

OSM has also declined to honor the Kentucky "on-site construction exemption" which exempts from the full permit and performance standards of the interim State surface mining law *bona fide* construction excavation which incidentally encounters coal. *James Moore*, IBSMA 79-10, 1 IBSMA 216, United States Department of the Interior, Office of Hearings and Appeals (July 20, 1979). The permanent program regulations further severely restrict the Section 528(3), 30 U.S.C. §1278(3) (1979), exemption for "the extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction". 30 CFR Part 707 (1979).

State regulatory agency. The uncontradicted proof was that the access road and exposed highwalls were completely safe, well engineered and would cause absolutely no environmental harm whatsoever, and the Administrative Law Judge had so found. He held, however, that he was bound by the Act and regulations to require that all highwalls in all circumstances be eliminated. The Board on appeal reluctantly affirmed, noting:

> It is with difficulty that we have reached the result in this case. Commonsense and fairness would appear to require an opposite result. The Federal law seems inescapable, however. Had Congress been presented with the factual situation herein, where elimination of the highwall would not benefit the environment but only burden the operator or landowner, it may have provided in the Act for some exception to the rigid backfilling requirement. Apparently, it was not. Clearly, it did not. We are constrained to affirm the Chief Administrative Law Judge. *Id.* at 352.

C. The Approximate Original Contour Requirement Adversely Affects Pike County's Integral Governmental Operations of Traditional Governmental Functions

The thrust of the *Usery* rule is that commerce clause legislation is unconstitutional as applied where the *effect* of the federal legislation displaces "state choices as to how state governmental operations should be structured" or "force the States to remake such choices themselves" *Usery* at 853 (declining to overrule *Fry* v. *United States,* 421 U. S. 542 (1975) on this ground). The record in this case is replete with examples of the precise effect of the AOC requirement on counties in Southwest Virginia, and it similarly, directly and immediately displaces Pike County's land use control authority regarding the configuration of

land for purposes of residential housing development, commercial development and the construction of public facilities.

A "traditional governmental function" of States is control over the use of land within their boundaries.[10] This is not disputed.

In Kentucky the land use control power is delegated by the State to the counties and cities, KRS 100.201 (1971). These powers may be exercised by cities, counties or regional planning units, KRS 100.113 (1971); with planning commissions, KRS 100.133 (1971), appointed by mayors and county judges. KRS 100.141 (1971). A comprehensive plan is required, KRS 100.183-191 (1971); and the units may exercise the power to zone, KRS 100.203 (1971); regulate subdivisions, KRS 120.273-283 (1971); and require construction permits to insure compliance, KRS 100.303 (1971). Pike County has exercised this delegated power by establishing a joint planning commission, comprehensive plan, and a zoning ordinance for Pikeville and for an area five miles outside its municipal boundaries.

The State of Kentucky through its own administrative agency regulates the temporary land uses of surface coal mining operations in the interest of environmental protection and thereby prescribes the attendant temporary land

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[10]This Court noted in *Warth* v. *Seldin*, 422 U. S. 490, 508 n. 18 (1975), that "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of the State and local legislative authorities". How essential to the separate and independent existence is suggested by the range of permissible objectives sanctioned by this Court: *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926) (encourage industrial development); *Belle Terre* v. *Boraas*, 416 U. S. 1 (1974) (dictate the social character of neighborhoods); *Agins* v. *Tiburon*, ____ U. S. ____, 100 S. Ct. 2138 (1980) (restrict urbanization).

uses. KRS Chapter 350 (1977). Long-term land use of the mined area *after* the surface mining operation reclamation is completed is subject only to local control. Further, Kentucky's statutory reclamation requirements concerning those aspects of long-term land configuration directly prohibited by the Act—allowing highwalls to be left exposed, mountaintops and contour mining benches left flat in order to form large tracts of useable flat land in mountainous counties—represents a clear State policy choice in furtherance of county land-use needs, controls and policies. This policy choice reflects a carefully balanced State deference to the long-term social and governmental needs of Pike County and its citizens—coal operators, environmentalists and surface owners alike. Specifically, Kentucky policy would not require highwalls and benches resulting from contour mining to be covered, *inter alia,* and would allow valley hollow fills to be situated adjacent thereto in order that developable flat land may be created by surface mining in counties where it is sorely needed and public revenues are chronically short.

Pike County has already experienced and will continue to suffer from the direct and indirect effects of the Act regarding its land uses. Some examples are:

1. Commercial Development. The *Tollage Creek* variance, described *supra,* was granted by the State in order that a commercial tree farm be established in Pike County. This economic development would add jobs, tax base and taxable activities in the county. This venture has been thwarted by the rigid highwall-covering requirement. Other like proposals will be similarly forstalled reducing job potential and tax revenue.

2. Public Facilities. Pursuant to the *Kentucky Aviation System Plan,* Landrum and Brown (1977), Pike County

has undertaken to construct a new $10 million regional airport on a mountaintop situated some eleven miles north of Pikeville. The land is to be donated to the county by private owners and the site is to be prepared at no cost to the county by a private surface coal mining operation acting under a state permit. This site preparation originally was to be performed under a Kentucky "on-site construction exemption" but the decision in *James Moore,* thwarted that plan. Consequently, the county decided to proceed under an alternative postmining land use variance granted by the State during the interim program. The variance and essential access road, and thus the entire venture, like that in *Tollage Creek,* are jeopardized by the Act and the regulations promulgated pursuant thereto.

3. Housing. In Dr. C. Theodore Koebel's work, *1979 Housing Report for Kentucky,* University of Louisville Urban Studies Center (1979), he noted:

> Housing shortages most likely have started to occur in several counties in Kentucky, with severe, chronic shortages occurring in Southeast Kentucky. . . . The region as a whole had a level of housing starts between 1970-1977 that would have housed only 56 percent of the increase in households. Mobile homes accounted for more than 50 percent of the total housing production in Breathitt, Harlan, Knox, Leslie, Magoffin, Perry, and Pike counties. Even with a massive reliance on mobile homes. it is doubtful that housing production in Southeast Kentucky would have been sufficient to avoid a severe housing shortage there. *Id.* at 59.

Pike County's serious and growing housing shortage is either caused or exacerbated by the severe and chronic lack of suitable residential construction sites. Over 75%

of the surface of the county is occupied by "steep slopes", and most of the remainder is situated in floodplains of the Big Sandy River and its tributaries. The number of households grew over 25% during the period 1970-1980. *Id.* at 340. The result is heavy reliance on mobile homes to meet the housing demand. During the period 1970-1978 of the nearly 7000 housing units added to the housing stock in Pike County (599% increase) 92% were mobile homes. *Id.* at 341. At the time of the survey in 1979 there were only some 800 mobile home sites available in the county. During this same eight-year period only 503 permanent single family dwellings and 70 multi-family units were added to the Pike County housing stock. *Id.* at 341.

The single most crippling factor lying behind and contributing to the Pike County housing shortage, now and in the future, is the lack of building sites—a factor which must be overcome in the future in order to solve the problem. Practically the entire surface of Pike County is underlain with coal. Surface coal mining operations in the future could provide the vital excavation, cut and fill work necessary to create residential building sites from "steep slopes" as it has traditionally. The Act and regulations embodying the AOC requirement, together with the lack of any meaningful variances because of the highwall requirement, forestall such developments in the future. Pike County presently has over 9000 mobile homes serving as temporary housing and has an immediate need for over 12,000 permanent housing units which cannot be constructed for want of building sites out of the floodplain area.

4. County Revenue. Pike County has a coal-based local economy and its budget revenues are tied directly and indirectly to coal production. Pike County's public revenues come from federal revenue sharing, local taxes on real

property and its share of the severance taxes collected by the State on coal mined in the County. Total property tax assessments for Pike County in 1979 were approximately $1 billion, *Annual Report 1978-1979,* Kentucky Department of Revenue (Dec. 1, 1979) at A-44-45, of which some $400 million was real property. *Id.* at A-51. Three-fourths of this was residential, commercial and industrial realty and the remaining one-fourth was mineral rights and unmined coal, farms and undeveloped acreage. The County received two-thirds of its locally generated revenues for 1979 from local property taxes. *Industrial Resources, Pike County, Kentucky,* Kentucky Department of Commerce (1978) at 26.

During 1978-79 over $500 million worth of coal was produced in Pike County on which over $25 million in severance taxes were paid to the State. *Annual Report 1978-1979,* at 104. Pike County received approximately one-third of its locally generated revenues from severance tax turnback funds in 1979, which is expected to increase in future years if coal mining increases in the County. In addition, the County was significantly, if indirectly, benefitted by some $14 million funding of the State Energy Road Fund and Coal Impact Road Fund which constructed new State highways in Eastern Kentucky, including Pike County. *Id.* at 110.

There can be little doubt that the challenged provisions of the Act affect these traditional governmental functions of Pike County both now and in the future. The immediate impact of the AOC requirement would reverse State and county land use policies regarding the creation of economically developable flat land by means of surface coal mining operations, disrupt long-settled legal relationships between the State and Pike County regarding land use con-

trols and long-term land uses of surface mined land, and force relinquishments by the County of its traditional reliance on privately conducted surface coal mining activities for excavation, cut and fill work to create sites for houses, roads, airports, and other public facilities. Because of this impact Pike County must reallocate scarce county budget monies to perform this work at public expense, alter its own internal organization and augment its own work force to perform the work itself or forego the benefits which would otherwise be generated for its citizens.

To the extent the AOC requirement thwarts or inhibits private residential construction and commercial developments in the County, the County will suffer diminished property tax revenues because undeveloped hillside land will not be converted into more highly taxable land. Severance tax turnback revenues to the County will be depressed to the extent the AOC requirement inhibits surface coal mining operations in the County. These losses of revenue must be recouped by new taxes or increased tax rates on the real property tax base, or the diminution in County revenues translated into lower levels of "traditional governmental services," poorer schools and fewer public facilities.

The precise effect the rigid AOC requirement will have in application to Pike County would be more tedious than illuminating to describe. Nor is it necessary:

> We do not believe particularized assessments of actual impact are crucial to resolution of the issue presented . . . the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe . . . [the land use policies] . . . to be [exercised] by the States in their capacities as sovereign governments. *Usery* at 852-853.

CONCLUSION

Invading directly the constitutional, social and economic base of power of the state, the AOC requirement of the Act is more destructive of dual sovereignty than the FLSA amendments struck down in *Usery*. Police power control over the private use of land within its borders lies closer to the heart of a state's separate and independent existence than does its unilateral control over the wages and hours of its employees.

Every twig in the Hofeldian "bundle of sticks" making up private ownership rights to land is created by the jurisprudence of the states, Hunt, "Federal and State Control of Land: A Synopsis," originally appearing in M. McDougal & D. Haber, *Property, Wealth, Land* 70-94 (Michie Publ. Co.) (1948); rights to land can be transferred only pursuant to the situs states' laws, *Fall* v. *Eastin,* 215 U. S. 1 (1909); *Irving Trust Co.* v. *Day,* 314 U. S. 556, 562 (1942); and these principles predate our federal Constitution. *Johnson* v. *M'Intosh,* 21 U. S. (8 Wheat.) 543 (1823).

The dual sovereignty concept begins with the recognition that our fundamental legal rights to privately-owned land are exclusively created, shaped and protected by the states under our unique federalist system. The right to own and use land is one of these basic constitutional rights under the exclusive protective control of the states which has been consistently recognized by this Court throughout history. Mr. Justice Washington gave voice to this premise in *Corfield* v. *Coryell,* 6 Fed. Cas. 545 (No. 3230) (C.C. E.D. Pa., 1823) expounding on the privileges and immunities of State citizens included under the clause of Article IV:

> "what these fundamental principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind . . . the right of a citizen of one State . . . to take hold and dispose of property, either real or personal . . . subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." *Id.* at 547.

Even the Civil War amendments, while conferring broad new constitutional powers on the central government, did not destroy the dual sovereignty structure of our federalist government. *Slaughterhouse Cases,* 83 U. S. (16 Wall.) 36 (1872). The constitutional difference between the first and second Agricultural Adjustment Acts of the New Deal era was the attempt by Congress in the former to regulate directly the use of land. Compare *United States* v. *Butler,* 297 U. S. 1 (1930); and *Mulford* v. *Smith,* 307 U. S. 38 (1939).

The provisions of the Act before the court again assault the citadel of State sovereignty, this time in the name of environmental protection, by directly displacing the exclusive power of the states' to control the configuration and long-term uses of land within their borders. Those provisions are and should be declared unconstitutional.

Respectfully submitted,

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DATED: December 19, 1980

amicus brief

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NOS. 79-1538, 80-231 & 79-1596

* * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

* * *

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

V.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, ET AL.,
Appellees.

* * *

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

V.

STATE OF INDIANA, ET AL.,
Appellees.

* * *

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, ET AL.,
Appellants,

V.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellee.

* * *

On Appeal from the United States District Courts for the Western District of Virginia and Southern District of Indiana

* * *

BRIEF AMICUS CURIAE OF THE STATE OF TEXAS IN SUPPORT OF THE COMMONWEALTH OF VIRGINIA

* * *

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On Appeal From the United States District Courts for the Western District of Virginia and Southern District of Indiana

* * *

BRIEF AMICUS CURIAE OF THE STATE OF TEXAS IN SUPPORT OF THE COMMONWEALTH OF VIRGINIA

* * *

In January of 1978 the Railroad Commission of Texas challenged the treatment of prime farmlands under the federal Surface Mining Control and Reclamation Act of

1977 by filing two actions which were subsequently settled on terms acceptable to the Railroad Commission. *State of Texas v. Andrus and Bergland*, Civil Action No. A-78-CA-35 (W.D. Texas); *State of Texas v. Andrus*, Civil Action No. 78-0171 (D.D.C.). Nevertheless, the Railroad Commission believes the constitutional arguments presented here by the Commonwealth of Virginia to be substantial and meritorious and respectfully urges this honorable Court to affirm the decisions of the district court.

Respectfully submitted,

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